

**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION**

CHRISTOPHER MCCULLOUGH,)

PETITIONER,)

vs.)

DANIEL JONES, WARDEN, et al.,)

RESPONDENTS.)

2007 FEB 20 P 1:18

DEBRA P. HACKETT, CLK
U.S. DISTRICT COURT
MIDDLE DISTRICT ALA

CASE NO. 3:07-CV-71-WHA

NOTICE OF CONVENTIONAL SUBMISSION OF EXHIBIT

Come now the Respondents, by and through the Attorney General for the State of Alabama, and hereby respectfully submit to this Court, in paper form, Exhibit 1A to the Respondents' Answer. This exhibit is submitted in this manner, rather than by electronic filing, due to its length. The remaining exhibits to the Respondents' Answer are electronically filed on today's date.

Respectfully submitted,

Troy King(KIN047)

Attorney General

By:



Marc A. Starrett

Assistant Attorney General

ID #STARM1168

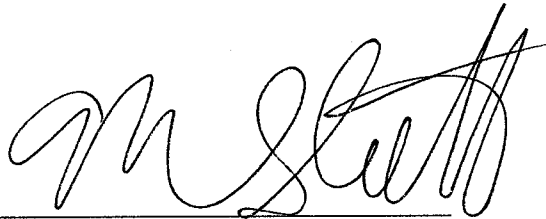
EXHIBIT:

EXHIBIT 1A: Record on appeal in McCullough's attempted burglary conviction, McCullough v. State, Alabama Court of Criminal Appeals CR-03-1103

CERTIFICATE OF SERVICE

I hereby certify that on this the 20th day of February, 2007, I filed the instant document and Exhibit 1A with the Clerk of the Court by hand delivery, and hereby certify that I have mailed by United States Postal Service the document to the following:

CHRISTOPHER MCCULLOUGH, AIS # 174909
Inmate, Donaldson Correctional Facility
100 Warrior Lane
Bessemer, Alabama 35023



Marc A. Starrett (STARM1168)
Office of the Attorney General
Alabama State House
11 South Union
Montgomery, AL 36130-0152
Telephone: (334) 242-7300
Fax: (334) 242-2848
E-Mail: MStarrett@AGO.State.AL.US

ADDRESS OF COUNSEL;

Office of the Attorney General
Criminal Appeals Division
11 South Union Street
Montgomery, Alabama 36130-0152
(334) 242-7300

Vol. 1 of 2

Court of Criminal Appeals No. CR-03-1103
APPEAL TO ALABAMA COURT OF CRIMINAL APPEALS
FROM
CIRCUIT COURT OF CHAMBERS COUNTY, ALABAMA

Circuit Court Case Number: CC 2002-318

Circuit Judge: Honorable Ray Martin

Type of Conviction / Order Appealed From: State Conviction

Sentence Imposed: 40 years

Defendant Indigent: X YES NO

CHRISTOPHER MCCULLOUGH

NAME OF APPELLANT

KYLA KELIM

APPELLANT'S ATTORNEY

(TELEPHONE NO.)

Post Office Box 1977

ADDRESS

ALEXANDER CITY ALABAMA 35010

CITY STATE ZIP CODE

v.

STATE OF ALABAMA

NAME OF APPELLEE

(State represented by Attorney General)

NOTE: If municipal appeal, indicate above, and enter

Name and address of municipal attorney below.

(For Court of Criminal Appeals use only)



ALABAMA COURT OF CRIMINAL APPEALS
APPEAL FROM CHAMBERS COUNTY, ALABAMA
APPELLANT: CHRISTOPHER MCULLOUGH
CHAMBERS COUNTY CASE NUMBER:CC 2002-318

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INDICTMENT

THE STATE OF ALABAMA, CHAMBERS COUNTY

CIRCUIT COURT, FALL TERM, 2002

The Grand Jury of Said County charges that before the finding of this Indictment, Christopher McCullough, alias and Billy Norris, alias, whose names are otherwise unknown to the Grand Jury, did, with the intent to commit the crime of burglary first degree (Section 13A-7-5 of the Code of Alabama), attempt to commit said offense by attempting to knowingly and unlawfully enter or remain unlawfully in a dwelling of another, to-wit: Mike Gragg, with intent to commit a crime therein, to-wit: theft, and while effecting entry or while in the dwelling or in immediate flight therefrom, the said Christopher McCullough and/or Billy Norris was armed with an explosive or deadly weapon, to-wit: a pistol, a further description of which is otherwise unknown the Grand Jury, in violation of Section 13A-4-2 of the Code of Alabama, against the peace and dignity of the State of Alabama.



District Attorney of the Fifth Judicial Circuit

ORIGINAL 02

ACK375

ALABAMA JUDICIAL DATA CENTER
GRAND JURY OF CHAMBERS COUNTY
WARRANT OF ARRESTGJ 2002 000270.00
TERM #: FALL

TO ANY LAW ENFORCEMENT OFFICER OF THE STATE OF ALABAMA:

AN INDICTMENT HAS BEEN RETURNED BY THE GRAND JURY OF CHAMBERS COUNTY
AGAINST MCCULLOUGH CHRISTOPHER

604 S 1ST AVE

LANETT

AL 36863-0000

CHARGING THE OFFENSE OF:

ATTEMPT - BURGLARY 1 13A-004-002

CNTS: 1

YOU ARE THEREFORE ORDERED TO ARREST THE PERSON NAMED ABOVE AND BRING THAT
PERSON BEFORE A JUDGE OR MAGISTRATE OF THIS COURT TO ANSWER THE CHARGES
AGAINST THAT PERSON AND HAVE WITH YOU THEN AND THERE THE WARRANT OF ARREST
WITH YOUR RETURN THEREON. IF A JUDGE OR MAGISTRATE OF THIS COURT IS
UNAVAILABLE, OR IF THE ARREST IS MADE IN ANOTHER COUNTY, YOU SHALL TAKE
THE ACCUSED PERSON BEFORE THE NEAREST OR MOST ACCESSIBLE JUDGE OF
MAGISTRATE IN THE COUNTY OF ARREST.

BOND SET AT: \$50,000.00

DATE ISSUED: 08/26/2002 CHARLES W. STORY
CLERK

BY: _____

EXECUTED THIS 26 DAY OF Aug

2002

BY

ARRESTING THE WITHIN NAMED DEFENDANT

C.M. Williams
LAW ENFORCEMENT OFFICER

BY: _____

DEFENDANT'S FEATURES:

HT: 0'00" HAIR: DOB: 11/27/1972

WT: 000 SEX: M EYE: RACE: B
SSN: 912000270

ADDTL COMMENTS: _____

Received in office this

SEP 03 2002

Sid Lockhart, Sheriff
Chambers Co. Sheriff's Dept.

08/26/2002 RHM

03

ACR375

ALABAMA JUDICIAL DATA CENTER
GRAND JURY OF CHAMBERS COUNTY
WARRANT OF ARRESTGU 2002 000270.00
TERM #: FALL

TO ANY LAW ENFORCEMENT OFFICER OF THE STATE OF ALABAMA:
AN INDICTMENT HAS BEEN RETURNED BY THE GRAND JURY OF CHAMBERS COUNTY
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604 S. 1ST AVE

LANETT AL 36863-0000

CHARGING THE OFFENSE OF:

ATTEMPT - BURGLARY 1 12A-004-002 CNTS: 1

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AGAINST THAT PERSON AND HAVE WITH YOU THEN AND THERE THE WARRANT OF ARREST
WITH YOUR RETURN THEREON. IF A JUDGE OR MAGISTRATE OF THIS COURT IS
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MAGISTRATE IN THE COUNTY OF ARREST.

BOND SET AT: \$50,000.00

DATE ISSUED: 08/26/2002 CHARLES W. STORY BY _____
CLERK

EXECUTED THIS _____ DAY OF _____ BY
ARRESTING THE WITHIN NAMED DEFENDANT _____

LAW ENFORCEMENT OFFICER _____

BY: _____

DEFENDANT'S FEATURES:

HT: 0'00" HAIR: DOB: 11/27/1972

WT: 000 SEX: M EYE: RACE: B
SSN: 912000270ADDTL COMMENTS: _____

08/26/2002 RHM

04

State of Alabama
Unified Judicial SystemPLEA OF NOT GUILTY AND WAIVER OF
ARRAIGNMENT

Case Number

Form CR-9 Rev. 3/95

CC 2002 ~~269~~
CC 2002 304, 312,
318
323IN THE Circuit COURT OF Chautauque ALABAMA
(Circuit, District, or Municipal) (Name of County or Municipality)☐ STATE OF ALABAMA v. Chris McCollough, Defendant

COMES NOW the Defendant in the above styled matter, and to the offense charged enters a plea of

- ☒ Not Guilty
☐ Not Guilty by Reason of Mental Disease or Defect
☐ Not Guilty and Not Guilty by Reason of Mental Disease or Defect

Defendant acknowledges receipt of the copy of the charge against him and further waives the right to have an Arraignment at which the Defendant is present in person, or at which the Defendant is represented by an attorney.

But, the Defendant specifically and expressly reserves the right upon the filing hereof to hereafter, but before trial or before such date as may be set by the Court, to interpose any defenses, objections, or motions which the Defendant had the right as a matter of law or rule to interpose in this cause, prior to the filing hereof.

Defendant's date of birth is 11/27/72 Defendant's age is 29

The Defendant is not eligible for consideration by the Court for Youthful Offender status as provided by law.

Sep 23, 02
 Date
Sep 23, 02
 Date

Chris M. Cullage
 Defendant
Steve R Morris
 Attorney for Defendant

This is to certify that I am the Attorney for the Defendant in this matter, and that I have fully explained this form and all matters set forth herein, and pertaining hereto, to the Defendant. I further state to the Court that I have explained to the Defendant his right to be Arraigned in person and his right to have me represent him at Arraignment. I further certify to the Court that my client hereby knowingly, voluntarily, and intelligently waives these rights after a full and complete explanation of each and every one of them to him by me. BOTH MYSELF AND THE DEFENDANT UNDERSTAND THAT I AM RESPONSIBLE FOR ASCERTAINING WHAT DATE, IF ANY, HAS BEEN SET BY THE COURT FOR THE MAKING OR FILING OF ANY DEFENSES, OBJECTIONS, OR MOTIONS. I FURTHER UNDERSTAND THAT I AM RESPONSIBLE FOR NOTIFYING MY CLIENT OF THE DATE HIS CASE IS SET FOR TRIAL, AND THAT I HAVE ADVISED AND INFORMED HIM THAT IN THE EVENT HE FAILS TO APPEAR ON THE DATE HIS CASE IS SET FOR TRIAL, ALL APPROPRIATE LEGAL ACTION WILL BE TAKEN BY THE COURT AGAINST THE DEFENDANT AND HIS BOND. I further certify to the Court that I have advised my client that he is responsible for obtaining the date his case is set for trial in this matter and that in the event he fails to appear on the date his case is set for trial all appropriate legal action will be taken by the Court against the Defendant and his bond, and I hereby certify that the Defendant knows that he is personally responsible for obtaining the date his case is set for trial and for being present in Court on that date.

Sep 23, 02
 Date

Steve R Morris
 Attorney for Defendant Signature

I certify that I served a copy of the foregoing plea and waiver of arraignment on the Prosecutor by mailing/delivering a copy of the same to him on

(Date)

Steve R Morris
 Printed or Typed Attorney's Name
P.O. Box 814 Wedgwood AZ 86078
 Address

This is to certify that my Attorney has explained each and every matter and right set forth in this form and I have completely and fully read and do so understand each and every matter set forth in this form. I further state to the Court that I do not wish to be personally present at an Arraignment in this case and that I do not want to have an Attorney represent me at an Arraignment and WITH FULL KNOWLEDGE OF EACH OF THESE RIGHTS, I HEREBY EXPRESSLY WAIVE SUCH RIGHTS. I further state to the Court that I have been informed of the charge against me and have received a copy of the charge.

9-23-02
 Date

Chris M. Cullage
 Defendant Signature

Filed in office this date _____

Clerk

By: _____

05

IN THE CIRCUIT COURT OF CHAMBERS COUNTY, ALABAMA

STATE OF ALABAMA,

PLAINTIFF,

VS.

CHRISTOPHER MCCULLOUGH,

DEFENDANT.

)
:
)
:
)
:
)
:
)
:
:CASE NUMBER: CC: 2002-304, 312
,318 & 325MOTION TO WITHDRAW

COMES NOW the undersigned attorney, Steve R. Morris, and respectfully requests this Honorable Court to allow him to withdraw as attorney of record in the above referenced case. As grounds therefore, the undersigned states that the following, to-wit:

1. Christopher McCullough has threatened me physically in a letter he wrote me.
2. Christopher McCullough has filed a complaint with the Bar against me.

WHEREFORE THESE PREMISES CONSIDERED, I respectfully request this Honorable Court to allow me to withdraw from the above referenced cases involving the Defendant, Christopher McCullough.

Respectfully submitted this 24 day of March, 2003.

Steve R. Morris

Steve R. Morris
Attorney at Law
Post Office Box 814
Wedowee, Alabama 36274
(256) 357-9211 - Telephone
(256) 357-9222 - Facsimile

FILED IN OFFICE THIS

MAR 31 2003

CHARLES W. STORY
CIRCUIT CLERK
CHAMBERS COUNTY, ALABAMA

06

IN THE CIRCUIT COURT OF CHAMBERS COUNTY, ALABAMA

STATE OF ALABAMA

VS.

CHRISTOPHER McCULLOUGH

)
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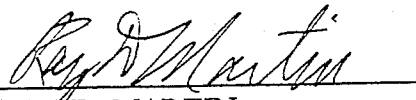
CASE NO. CC-02-304, 312,
318, and 325

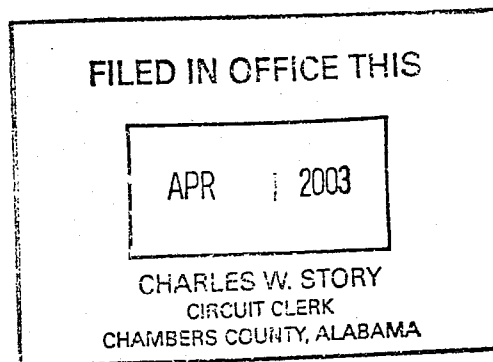
ORDER

For good and sufficient cause, Hon. Steve R. Morris' Motion to Withdraw is GRANTED. It is further Ordered that Hon. Nick Wooten be appointed to represent the defendant in the cases.

Let a copy of this Order issue to the defendant, counsel, and the District Attorneys Office.

Signed this the 1st day of April, 2003.


RAY D. MARTIN
CIRCUIT JUDGE



S. Morris, N. Wooten, DA, fail, so, C. McCullough

07

IN THE CIRCUIT COURT OF
CHAMBERS COUNTY, ALABAMA

STATE OF ALABAMA,

VS.

CHRISTOPHER McCULLOUGH,

DEFENDANT.

)
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)

CC-02-304, 312, 318
325

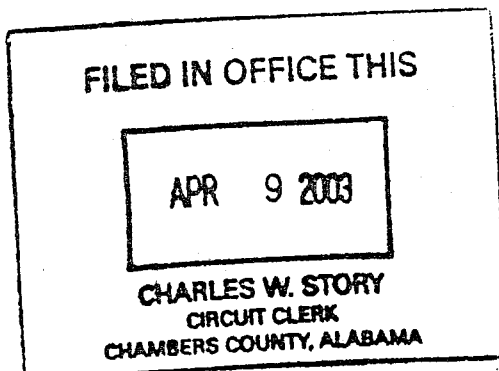
MOTION TO WITHDRAW

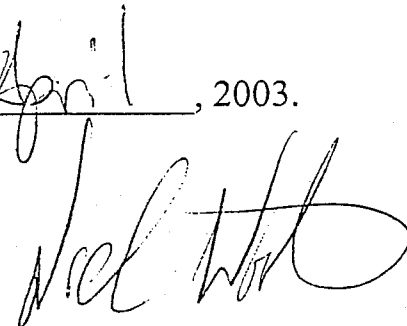
Comes now Nicholas Wooten and moves this Court for an order allowing him to withdraw. As grounds therefore this attorney would show as follows:

1. That he withdrew from the active practice of criminal law after the spring term of 2001 and does not at this time accept on an appointed or retained basis any criminal defense work.
2. That he was appointed on April 1, 2003.
3. That no harm will inure to the Defendant by allowing this attorney to withdraw.

Wherefore, this attorney moves Your Honor for an order allowing him to withdraw from this case for the above stated grounds.

DONE this the 9 day of April, 2003.




Nicholas H. Wooten (WOO084)
Attorney for Defendant
P.O. Drawer 290
Lafayette, Al. 36862

08

IN THE CIRCUIT COURT OF CHAMBERS COUNTY, ALABAMA

STATE OF ALABAMA

VS.

CHRISTOPHER McCULLOUGH

CASE NO. CC 02-312,318

ORDER

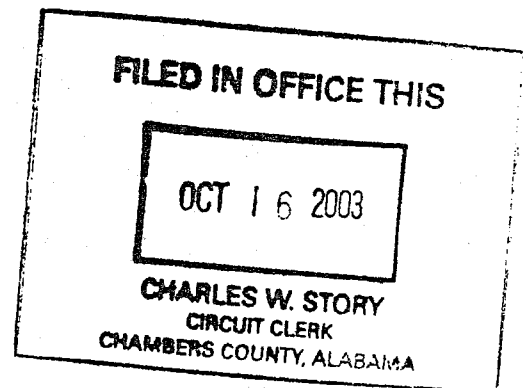
It has been brought to the attention of the Court that Billy Norris, AIS #225773, a witness in the above styled case may be presently in the custody of the Draper Correctional Facility, and said witness must be before this Court to provide testimony on behalf of the State on November 4, 2003, at 9:00 a.m. CST.

IT IS ORDERED that the Chambers County Sheriff's Office make arrangements with the Draper Correctional Facility to transport the said witness to this County for trial on the date and time indicated above. Upon the completion of the trial scheduled in this case, **IT IS ORDERED** that the Sheriff of Chambers County, Alabama, return custody of the witness to the Draper Correctional Facility.

The Clerk of the Court is to mail a copy of this Order to counsel of record for the defendant, the Office of the District Attorney, the Chambers County Sheriff's Office and the Department of Corrections.

SIGNED this 16th day of October, 2003.

Edward F. Bryan
Circuit Judge



K K. L. m. DA. SO. Doc. 1011

09

IN THE CIRCUIT COURT OF CHAMBERS COUNTY, ALABAMA

STATE OF ALABAMA

vs.

CHRIS McCULLOUGH

CASE NO. CC-02-304, 312, 318, 325


ORDER

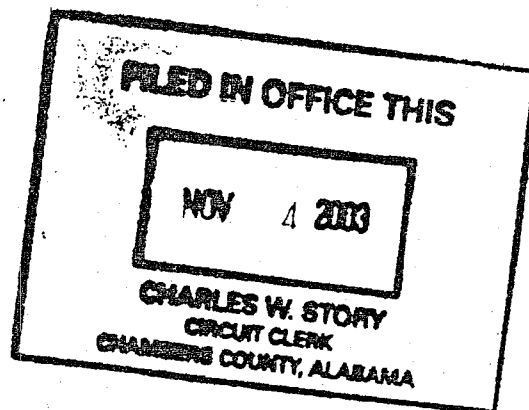
It has been brought to the attention of the Court that the above defendant is scheduled to appear before the Court on November 13, 2003, at 9:00 a.m.

The Chambers County Sheriffs Department is Ordered to make arrangements with the Department of Corrections to transport the defendant to said hearing. Upon completion of the hearing, the defendant shall be returned to the Department of Corrections.

Let a copy of this Order issue to the defendant, counsel, the District Attorneys Office, the Chambers County Sheriffs Department, and the Department of Corrections.

Signed this the 3rd day of November, 2003.


RAY D. MARTIN
CIRCUIT JUDGE



K. Kelvin, DA, SO, Jai, DC, C. McCullough

IN THE CIRCUIT COURT FOR CHAMBERS COUNTY
AT LAFAYETTE, ALABAMA

STATE OF ALABAMA,

Plaintiff,

vs.

CHRISTOPHER MCCULLOUGH,

Defendant.

Case NO.: CC 2002-318

DEFENDANT'S REQUESTED JURY INSTRUCTION REGARDING ATTEMPT

COMES NOW the Defendant, Christopher McCullough, and by and through the undersigned, requests this Honorable Court give, in addition to standard instructions regarding this matter, the following instruction of law to the jury that are particular to the facts of this case:

1. REQUESTED INSTRUCTION NUMBER SIX

The Court charges the jury that the following is a principle of law that applies to someone who attempts a burglary.

An attempted burglary consists of "an act done with the intent to effectuate a burglary, carried beyond mere preparation to commit it but falling short of its actual commission. An indictable attempt thus consists of two important elements: (1) an attempt to commit burglary, and (2) a direct ineffectual act done toward its commission."

13 Am. Jur. 2d Burglary §§ 29 (1964). See also Popwell v. State, 480 So.2d 41, 44 (Ala.Cr.App. 1985).

"In order to prove an attempted burglary, the State must show an act done with the intent to effectuate the alleged burglary. Intent has been defined as "'a state of mind existing at the time a person commits an offense. If intent required definite and substantive proof, it would be almost impossible to convict, absent facts disclosing a culmination of the intent. The mind of an alleged offender, however, may be read from his acts, conduct, and inferences fairly deductible from all the circumstances.'" 13 Am. Jur.2d Burglary §§ 52. In Groneau [v. State, 201 So.2d 599, 602 (Fla. Dist. Ct. App. 1967)], we find:

"Although an overt act does not establish the particular intent to commit a specific crime, yet intent, being a state of mind, or mental process, may be proved by the statement or act of the person whose act is being scrutinized and may also be inferred from the facts and circumstances as is the case in consummated crimes. 1 Wharton's Crim. Law, Attempts, §§ 234 (12th ed.). State v. Tomblin, 1942, 124 W. Va. 264, 20 Southeast 2d 122; State v. Leach, 1950, 36 Wash.2d 641, 219 P.2d 972."

Popwell v. State, 523 So.2d 515 (Ala. Crim. App. 1987), cert. denied.

Granted

100

100

- 100

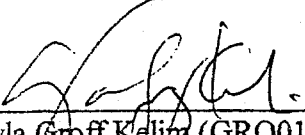
100

100

100

100

Respectfully submitted,


Kyla Groff Keliza (GRO014)

Attorney for Defendant, Christopher McCullough

Alec Brown & Associates, P.C.
217 Madison Street
P.O. Box 1977
Alexander City, Alabama 35011-1977
(256) 409-9001

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served counsel for the State in the foregoing matter with a true and correct copy of the foregoing document by hand delivery or by mailing a copy thereof, postage prepaid to him at his respective address on this the 14th day of November, 2003.


Of counsel

13

3. No particular act or acts are necessary on the part of the defendant and it is sufficient to make out an offense if you the jury are convinced, beyond a reasonable doubt, that the defendant was present with a view to render aid should it become necessary.

Rad Ke vs. State, 292 Ala. 290, 293 So. 2d 314 (1974)

Given: _____

Refused: _____ 

4. REQUESTED JURY CHARGE NO.: _____

An attempt necessarily lies somewhere between mere intent, which alone is not punishable, and the completed offense. . . . Preparation consists in arranging the means or measures necessary for the commission of the offense; the attempt is the overt movement towards the commission after preparations are made. It must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter.

Commentary, Section 13A-4-2, Code of Alabama (1975)

Harris v. State, 580 So. 2d 33, 35 (Ala. Crim. App 1990)

GIVEN: _____

REFUSED: _____

15

IN THE CIRCUIT COURT FOR CHAMBERS COUNTY
AT LAFAYETTE, ALABAMA

STATE OF ALABAMA,

Plaintiff,

vs.

CHRISTOPHER MCCULLOUGH,

Defendant.

)
)
)
)
)
)
)

Case NO.: CC 2002-318

ORDER ON DEFENDANT'S REQUESTED JURY INSTRUCTIONS

THIS MATTER HAVING COME BEFORE THE COURT, and after a hearing the court being fully advised on the instructions as requested,

IT IS HEREBY ORDERED AND ADJUDGED that the Court rules as follows as to Defendant's requested instructions:

1. REQUESTED INSTRUCTION NUMBER ONE

The Court charges the jury that the following is a principle of law that applies to that, to someone who attempts a crime. A person is not liable of attempt if, under circumstances manifesting a voluntary and complete renunciation of their criminal intent, they avoid the commission of the offense by abandoning the criminal effort. And if a mere abandonment is insufficient to accomplish the avoidance, by taking further affirmative steps to prevent it. The burden of injecting the issue of abandonment of the attempt is on the Defendant, but it does not shift any burden of proof. Before the State is entitled to a conviction as to this offense, the State must prove beyond a reasonable doubt that the Defendant did not avoid the commission of that offense by abandoning his criminal effort in regard to that offense under circumstances manifesting a voluntary and complete renunciation of his criminal intent in regards to that offense. And that same proposition applies to attempted burglary.

GIVEN _____

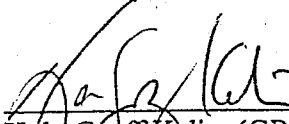
REFUSED _____

*Gave Pattern Instruction, from
"Use Notes" + Statute*

GIVEN _____
REFUSED _____

Such a charge is warranted where the instructions, as a whole, do not adequately cover the issue of bias on the part of the witness. See e.g. Harris v. State, 539 So.2d 1117 (Ala. Crim. App. 1988).

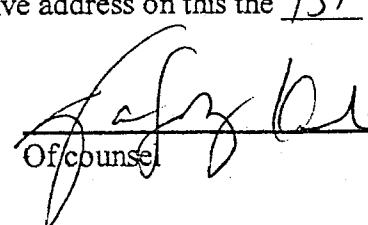
Respectfully submitted,


Kyla Groff Kelim (GRO014)
Attorney for Defendant, Christopher McCullough

Alec Brown & Associates, P.C.
217 Madison Street
P.O. Box 1977
Alexander City, Alabama 35011-1977
(256) 409-9001

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served counsel for the State in the foregoing matter with a true and correct copy of the foregoing document by hand delivery or by mailing a copy thereof, postage prepaid to him at his respective address on this the 13th day of November, 2003.


Of counsel

11

IN THE CIRCUIT COURT OF CHAMBERS COUNTY, ALABAMA

STATE OF ALABAMA,
Plaintiff,

vs.

CHRISTOPHER McCULLOUGH,
Defendants.*
*
*
*
*
*

CC-____-

STATE'S REQUESTED JURY INSTRUCTIONS

COMES NOW THE STATE OF ALABAMA, by and through the Chief Deputy District Attorney for the Fifth Judicial Circuit, and requests that the following instructions be given to the jury:

5. A person is guilty of an attempt to commit a crime if, with intent to commit a specific offense, he does any overt act towards the commission of such offense. § 13A-4-2, Code of Alabama 1975.

☒ Given *from Pattern Charge* _____ Denied

6. [T]he attempt is the overt movement towards the commission after preparations are made. It must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter. Harris v. State, 580 So.2d 33, 35 (Ala.Crim.App.1990).

_____ Given ☒ Denied

7. One is criminally liable for attempting the commission of a crime even though his endeavor falls short of the ultimate intended objective. Commentary, § 13A-4-2, Code of Alabama 1975.

☒ Given _____ Denied

8. An "attempt" to commit a crime consists of three elements: (1) an intent to commit a crime; (2) performance of some overt act toward commission of the offense; and (3) the failure to consummate its commission. Commentary, § 13A-4-2, Code of Alabama 1975.

☒ Given _____ Denied

18

9. An attempt need only be some deed short of consummation. Huggins v. State, 41 Ala.App. 548, 142 So.2d 915, cert. denied, 273 Ala. 708, 145 So.2d 918 (1962).

_____ Given

☒ Denied

Bill Lisenby, Chief Deputy District Attorney

Questions ① - ~~to~~ who own the ~~cars~~
and were there fingerprints on them

② Was the defendant ever given the opportunity to write
~~the~~ his statement in his own words

③

You have heard all of the testimony in this case. I cannot answer the questions above. You must rely on each other to consider all of the testimony presented which may apply to either question above.

20

The State and defendant ^{with advice of counsel} have stipulated that two pistols were recovered from the vehicle ^{involved in this case,} and have agreed that those weapons do not need to be brought into court today.

Based on this stipulation, you, the jury, shall consider ~~these~~ ^{these} weapons as evidence just as if they were ^{presented here} ~~present~~ ^{open} in court today.

21

IN THE CIRCUIT COURT OF CHAMBERS COUNTY, ALABAMA

STATE OF ALABAMA

VS.

CHRISTOPHER McCULLOUGH,

)
)
)
)
)

CASE NO. CC-02-318

JURY VERDICT FORMS

We, the Jury, find the Defendant, Christopher McCullough, guilty of the offense of attempted burglary in the first degree, as charged in the indictment.

Geryl Morgan
Foreperson

We, the Jury, find the Defendant, Christopher McCullough, guilty of the offense of attempted burglary in the second degree – a lesser included of burglary in the first degree, as charged in the indictment.

Foreperson

We, the Jury, find the Defendant, Christopher McCullough not guilty.

Foreperson

11/14/03
Date

Geryl Morgan
Printed Name of Foreperson

22

ACQUITTAL

There comes a time when a defendant is acquitted of a crime. This is a time when the defendant is found not guilty of the crime charged.

FILED IN OFFICE THIS
DEC 8 2006
CHARLES W. STORY
CIRCUIT CLERK
CLAY COUNTY, ALABAMA

2. The State did not corroborate the testimony of the Co-Defendant, Billy Harkins, who testified that he saw the Defendant with a gun. The State did not corroborate the testimony of the Co-Defendant, who testified that he saw the Defendant with a gun. The State did not corroborate the testimony of the Co-Defendant, who testified that he saw the Defendant with a gun.

3. The State did not corroborate the testimony of the Co-Defendant, Billy Harkins, who testified that he saw the Defendant with a gun. The State did not corroborate the testimony of the Co-Defendant, who testified that he saw the Defendant with a gun. The State did not corroborate the testimony of the Co-Defendant, who testified that he saw the Defendant with a gun.

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23

A schematic diagram of a 2D hexagonal lattice. The lattice is composed of solid black circles representing atoms. A central atom is labeled 'A'. It is surrounded by six nearest neighbors, labeled 'B' through 'G'. The lattice extends to the edges of the frame, with atoms labeled 'H' through 'M'.

[illegible]

MOTION FOR RENDITION OF JUDGEMENT

Here comes Charles McCullough Defendant at this trial brings about under the Honorable Court a Motion to Render Judgment of Justification pending Sentencing. My reasons for this motion is Adequate and properly brought to the Honorable Court in an appropriate manner 4 weeks before Sentencing.

The Statutes I am about to state are laws of the Alabama Criminal Procedure (Amended 2001-2002) & (2002-2003).

- ① If an Defendant goes to trial on charges of Charges the charges that he is facing can not be used as prior offenses for sentencing. They can be used to enhance sentence but to the Trial Judge. Therefore he shall own these enhancements concerning the information to show how they are used.
- ② If an Defendant goes to trial on charges of Charges the charges that he is facing can not be used as prior offenses for sentencing. They can be used to enhance sentence but to the Trial Judge. Therefore he shall own these enhancements concerning the information to show how they are used.

26

IN THE CIRCUIT COURT OF CHAMBERS COUNTY, ALABAMA

STATE OF ALABAMA

vs.

CHRISTOPHER McCULLOUGH

)
)
)
)
)

CASE NO. CC-02-318

VERDICT ORDER

On November 14, 2003, a duly empaneled jury returned the following verdict:


"We, the jury, find the Defendant, Christopher McCullough, guilty of the offense of attempted burglary in the first degree, as charged in the indictment.

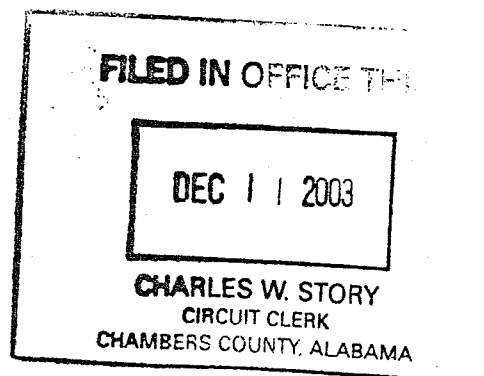
Geryl Morgan
Foreperson"

Based upon the verdict of the jury, it is ORDERED ADJUDGED AND DECREED that the defendant is guilty of the offense of burglary in the first degree. The defendant is Ordered to appear before the Court on December 16, 2003, at 1:00 p.m. for formal sentencing hearing. The Office of Probation and Parole is instructed to prepare a pre-sentence report for said defendant.

Let a copy of this Order issue to the defendant, counsel, the District Attorneys Office, the Office of Probation and Parole, and the Chambers County Sheriffs Department.

Signed this the 11th day of December, 2003.


RAY D. MARTIN
CIRCUIT JUDGE



K. Kelen, DA, SO, Jail, Prob Dept,

21

IN THE CIRCUIT COURT OF CHAMBERS COUNTY, ALABAMA

STATE OF ALABAMA

VS.

CHRISTOPHER McCULLOUGH

)
)
)
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)

CASE NO. CC-02-318

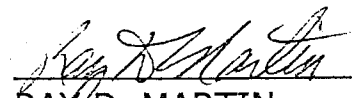
ORDER

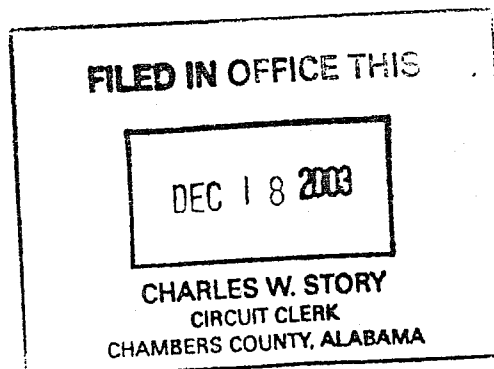
The hearing in the above cause shall be continued to January 15, 2004, at 9:00 a.m.

The Chambers County Sheriffs Department is Ordered to make arrangements with the Department of Corrections to transport the defendant to said hearing. Upon completion of hearing, the defendant shall be returned to the Department of Corrections.

Let a copy of this Order issue to the defendant, counsel, the District Attorneys Office, the Office of Probation and Parole, and the Chambers County Sheriffs Department.

Signed this the 16th day of December, 2003.


RAY D. MARTIN
CIRCUIT JUDGE



K. K. Wm. DA. So have Prob Dept

28

IN THE CIRCUIT COURT OF CHAMBERS COUNTY, ALABAMA

STATE OF ALABAMA

VS.

CHRISTOPHER McCULLOUGH

)
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)
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)

CASE NO. CC-02-318

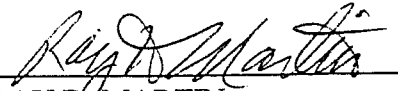
ORDER

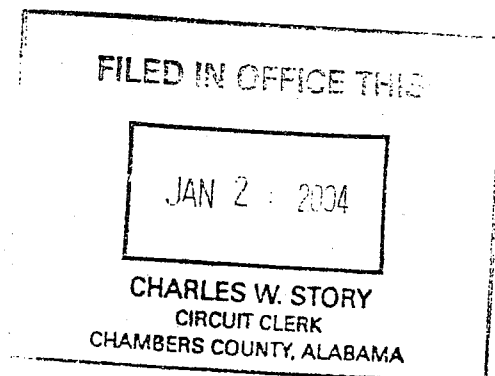
The defendant appeared before the Court this date with counsel for Sentencing Hearing. The defendant was represented by Hon. Kyla Kelim. The District Attorneys Office was represented by Hon. Bill Lisenby.

After consideration of all submissions, it is Ordered that the defendant be sentenced to the Department of Corrections for a term of forty (40) years. The defendant is Ordered to pay all court costs. The defendant is Ordered to reimburse the State of Alabama for court appointed attorney. The defendant is Ordered to reimburse Chambers County for any medical expenses incurred on behalf of Defendant. The defendant is Ordered to pay a Victims Compensation Fund Award of \$100.00.

Let a copy of this Order issue to the defendant, counsel, the District Attorneys Office, the Office of Probation and Parole, and the Chambers County Sheriffs Department.

Signed this the 15th day of January, 2004.


RAY D. MARTIN
CIRCUIT JUDGE



K. Kelim DA SO. Law Prob Dept,

29

IN THE CIRCUIT COURT OF CHAMBERS COUNTY
AT LAFAYETTE, ALABAMA

STATE OF ALABAMA,

)

Plaintiff,

)

vs.

)

CC 2002-318

CHRISTOPHER MCCULLOUGH,

)

Defendant.

)

MOTION FOR NEW TRIAL

COMES NOW, the Defendant, Christopher McCullough, and by and through the undersigned attorney of record, respectfully requests this Honorable Court enter an Order Granting his Motion for New Trial, setting aside his conviction of November 14, 2003 and sentence entered January 15, 2004, and as grounds would show:

1. On November 14, 2003, following a jury trial in this matter, Christopher McCullough was found guilty as charged in the indictment of Attempted Burglary in the First Degree.
2. On January 15, 2003, the court sentenced Christopher McCullough to a term in prison of forty years.
3. Christopher McCullough is entitled to a new trial in this case, due to numerous errors during trial depriving him of a fair and impartial trial and the due process of law.
4. Christopher McCullough is entitled to a new trial in this case, as the verdict is contrary to the law and the weight of the evidence.
5. Christopher McCullough sets out the following as mandating a new trial in this matter, and further reserves his right to bring additional grounds once a transcript of the proceedings has been reviewed in this case.

I. THE STATE FAILED TO PROVE A PRIMA FACIE CASE

A. NO OVERT ACT PROVEN

In this case, the Defendant was indicted and tried on a charge of attempted burglary in the first degree. In order to prove burglary in the first degree, the State must prove that the defendant entered or unlawfully remained in the dwelling of another with the intent to commit a crime

while armed with a deadly weapon. Ala. Code Section 13A-7-5. In order to prove the crime of attempt, the state must prove that the defendant committed any overt act towards the commission of the offense. Ala. Code Section 13A-4-2.

During the trial of the case, the evidence showed that Ms. Pearl Trammell observed a man outside the window of Mike Gragg's home who appeared to have a bandana over his face. She warned Mr. and Mrs. Gragg. Mrs. Gragg reported seeing two person running through the back yard away from the home seconds later. All witnesses in the home testified that no one entered the home or appeared to have attempted to enter the home. No witness in the home testified that he or she saw a weapon in any of the assailants' hands.

The police responded to a 911 call immediately made by Mr. Gragg within one minute and took up what they described as "hot pursuit" of the individuals through the yard. The defendant and co-defendant Billy Norris were stopped in an area behind the Gragg home in the defendant's automobile. After some 20 minutes of searching, the police discovered two guns in the rear trunk area of the car. The co-defendant testified that the defendant was armed when he approached the Gragg home, but both he and the defendant ran when they heard sirens.

The only evidence that supports a conviction was the testimony of the co-defendant and the unsigned statement of the defendant. The defendant testified that he was trying to stop Billy Norris from kicking in the front door of the home and committing a crime, and was approaching the home to stop Norris from committing any crime on the property. He denied being armed. He denied making a statement to police that he approached the home while armed and left when he saw people were inside the home.

Following the state's evidence, and again following the defendant's case, the defendant moved for a judgment of acquittal, based on the state's failure to prove a prima facie case. The motions were denied.

The conviction cannot stand while support only by the unsigned statement of defendant and the testimony of the co-defendant, a convicted liar who received a favorable plea bargain in exchange for his testimony, and who repeatedly made self-serving statements regarding his involvement in the offense.

The only credible evidence of an overt act is that Christopher McCullough was present on the Gragg's property while wearing a ski mask, and left the area without attempting to gain entry to the home. To sustain a conviction for attempted burglary in the first degree, justice requires more than mere presence with a ski mask.

An attempted burglary is defined in 13 Am.Jur.2d Burglary § 29 (1964) as: "an act done with the intent to effectuate a burglary, carried beyond mere preparation to commit it but falling short of its actual commission. An indictable attempt thus consists of two important elements: (1) an attempt to commit burglary, and (2) a direct ineffectual act done toward its commission."

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In other words, an overt act is requires the direct and ineffectual act done towards its commission. The defendant in this case, according to all credible testimony and evidence, did not commit a "direct, ineffectual" act by the mere presence on the property while wearing a ski mask.

II. INSUFFICIENT CORROBORATION OF CODEFENDANT'S TESTIMONY

In this case, the only evidence that defendant committed the crime of attempted burglary came in the form of testimony from co-defendant Billy Norris. The conviction cannot stand upon this testimony alone.

'The test for determining whether there is sufficient corroboration of the testimony of an accomplice consists of eliminating the testimony given by the accomplice and examining the remaining evidence to determine if there is sufficient incriminating evidence tending to connect the defendant with the commission of the offense.' *Tarver v. State*, 500 So.2d 1232 (Ala.Cr.App. 1986), affirmed, 500 So.2d 1256 (Ala. 1986), cert. denied, 107 S.Ct. 3197, 96 L.Ed.2d 685 (1987), citing, *Miller v. State*, 290 Ala. 248, 275 So.2d 675 (1973) (emphasis supplied)."
Garrison v. State, 520 So.2d 219 (Ala.Cr.App. 1987)'

Patterson v. State, 538 So.2d 44 (Ala. Crim. App. 1988). See also *Hardley v. State*, 766 So.2d 154 (Ala. 1999), discussing Ala. Code Section 12-21-222 and reversing the conviction.

By examining the evidence in light of this test, the only facts that the state could deduce was that:

1. Christopher McCullough was on the property of Mike and Judith Gragg (only from the defendant's testimony);
2. Christopher McCullough was wearing a ski mask at the time of the offense (or, at least, during the state's case, that he was carrying a ski mask that was similar to one seen by the occupants on a person in the yard)
3. Christopher McCullough did not take any act towards gaining entry to the home or take any act at all other than walking on the property;
4. Christopher McCullough left the scene without taking property or attempting entry.
5. That after he was stopped, several guns were found in his car.

A brief examination of these facts show that no sufficient corroboration exists upon which
the court can rest a verdict of guilty to the charge of attempted burglary.

Even if the court finds that the unsigned statement of Christopher McCullough was properly admitted and can be used in this test, it adds the following:

6. That Christopher McCullough entered the property with a gun and with the intent to enter the home of Mike and Judith Gragg to commit a theft but voluntarily left the property upon learning that the home was occupied, thus abandoning the attempt.

Under the facts as set out above, the conviction must be set aside as the unsigned statement constitutes abandonment of the offense, which is a complete defense. Without the uncorroborated testimony of Billy Norris, the state cannot refute the defense of abandonment. See Ala. Code Section 13A- Further, without the statement of the defendant and the statement of Billy Norris, only the defendant's presence suggests involvement. "[T]he accused's proximity itself, in most cases, is not enough evidence for corroboration." *Scott v. State*, 728 So.2d 164 (Ala. Crim. App. 1997).

Very like the *Hardley* case cited above, when the court reviews the evidence without the self serving testimony of Billy Norris, there is not corroboration to state that Defendant committed the offense, sufficient to support a conviction. The court must grant the Defendant's Motion for New Trial, and place the case back on the jury docket for the next available trial setting.

III. TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON LESSER INCLUDED OFFENSE OF CRIMINAL TRESPASS IN THE FIRST DEGREE

The Defendant requested the court charge the jury on the lesser included charge of Criminal Trespass in the First Degree. The court refused, stating that the defendant's testimony, that he was present on the Gragg's property to prevent a crime from occurring, negated a finding of Criminal Trespass.

Whether or not a crime is a lesser included offense of a charged offense must be examined on a case by case basis. *Auccin v. State*, 548 So.2d 1053, 1057 (Ala. Cr. App. 1989). Clearly, under the facts of this case, the charge of criminal trespass in the first degree is warranted. The facts showed that the defendant entered the property of Mike and Judith Gragg while wearing a ski mask but did not enter or attempt to enter the home, and instead left the property. In *C.P. v. State*, 597 So.2d 246 (Ala. Crim. App. 1992) this Court found that Criminal Mischief in the Third Degree was a lesser included offense of Attempted Burglary in the Third Degree where the victim stated that the defendant cut the screen to her window but then left, and later admitted to her that he had cut her screen. In this case, the Court found that the trial court property found the defendant guilty of criminal mischief in the third degree.

Similarly, in this case, the facts supported a jury finding that the defendant was on the property unlawfully, regardless of his intentions, and the trial court erred in refusing the charge

on the lesser included offense. Indeed, it is the intent element that distinguishes the offense of burglary from that of criminal trespass.

In *Womack v. State*, 462 So.2d 1020 (Ala. Crim. App. 1984), the court set out that:

It is well established under Alabama law that an individual accused of the greater offense has a right to have the court charge on the lesser offenses included in the indictment when there is a reasonable theory from the evidence to support his position. *Fulghum v. State*, 291 Ala. 71, 277 So.2d 886 (1973); *Chavers v. State*, 361 So. 2d 1106 (Ala. 1978); *Staggs v. State*, 51 Ala. App. 203, 283 So.2d 652 (Ala. Crim. App. 1973).

In the *Womack* case, the defendant was found crawling out of a window at a school where an air conditioner was discovered missing at 1:45 a.m. Although the court stated that the facts would support a finding of intent to steal, it went on to state: "since neither the missing air conditioner nor any other property from the school was ever traced to his possession, there is a lack of evidence, which is consistent with guilt only of the lesser offense." *Id.* The *Womack* court reversed the conviction for burglary and ordered a new trial.

In this case, the defendant testified that he was on the Gragg property, that he did not have permission to be there, and that he did not have an intent to go into the home or steal anything. The elements of criminal trespass encompass this set of facts, and it was clear error in refusing to instruct the jury on the lesser included offense.

Such a refusal constitutes reversible error.

IV. THE TRIAL COURT'S SENTENCE WAS DISPROPORTIONATE.

Defendant Christopher McCullough was sentenced to 40 years in prison following his conviction for attempted burglary in the first degree. In this case, the co-defendant pled guilty to the offense and received a twenty year sentence. Because Mr. McCullough exercised his right to a trial, in essence, his sentence was doubled. This excessive sentence the law does not allow.

Alabama courts recognize the importance of proportionality in sentencing:

Proportionality of sentence is certainly a vital constitutional guarantee. *Anderson v. State*, 455 So.2d 957, 958 (Ala. Crim. App. 1984)(citing *Solem v. Helm*). In *Ex parte Maddox*, 502 So.2d 786 (Ala. 1986), the Alabama Supreme Court noted that the state's appellate courts are generally prohibited from reviewing sentences that are within the limits prescribed by statute. The Court further stated:

'However, the appellate courts may review a sentence, which, although within the prescribed limitations, is so disproportionate to the offense

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charged that it constitutes a violation of a defendant's Eighth Amendment rights. 'The United States Supreme Court in *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), recognized that reviewing courts should grant substantial deference to the authority of the legislatures in determining the kinds and limits of punishment for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals. Yet, the sentence should be proportionate to the crime." *Id.* at 789-90 (citation omitted).'

Wilson v. State, 830 So.2d 765 (Ala. Crim. App. 2001). Further, while not a controlling factor, "Appellate courts should 'examine the penalty imposed upon the defendant in relation to that imposed upon his accomplices, if any.' *Beck v. State*, 396 So. 2d 645, 664 (Ala. 1980)." *Gavin v. State*, CR 99-1127 (Ala. Crim. App. 9/26/2003).

The evidence showed that while the offense certainly frightened the occupants of the Gragg home, no crime involving property or person ever took place. By comparison, the defendant was sentenced following a jury trial on a charge of Burglary in the First Degree, a Class A felony, with the same criminal history, a conviction for Receiving Stolen Property in the Second Degree, a class C felony, some 10 years before, and received a sentence of fifteen years. The circumstances facing the trial judge at sentencing in this case were identical to that case, CC 02-189, other than the fact that the conviction was for a less serious offense and, in fact, for an attempt to commit a crime. The presentence investigation reveals much animus on the part of the State. In recommending the maximum sentence, life or 99 years, the probation officer cites three reasons for this sentence: 1) the prior conviction for receiving stolen property in the second degree; 2) the seriousness of the offense and 3) his bad attitude.

Sentencing should not be reduced to a popularity contest. It would be distinctly unfair, and illegal, to allow "attitude" to control the length of sentence. In this case, that is precisely the situation. The prior conviction does not warrant a forty year sentence under the habitual offender act. The conviction was for a nonviolent offense that was 10 years old. The undersigned has never in her career witnessed a forty year sentence imposed on such a basis, even in combination with a similar, serious offense. The trial court that sentenced the Defendant on the Burglary 1st charge, that arose out of conduct occurring at or near the time of the instant offense and thus not accountable under the habitual offender act, imposed a sentence that was less than that received by the co-defendant pursuant to a plea agreement. In that case, the Defendant's fifteen year sentence was considerably less than Norris' 24 year sentence. As stated above, while neither counsel nor Defendant downplays the seriousness of the Gragg's apprehension, the lack of crime against property or person would lend itself to a lesser, not greater sentence. In short, as the courts of this state mandate, the punishment must fit the crime. If the Defendant has a "bad attitude" while serving a sentence, he will end up serving a great majority of that sentence and will be denied any good time incentive for early release, and also denied parole. The state has a mechanism in place to deal with "bad attitude" and it is a dangerous precedent indeed for courts of the state to place the probation officer's perception of "attitude" in such high regard.

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The sentence is grossly disproportionate to the offense that was the subject of conviction, an attempted crime. The undersigned cannot find a similar sentence anywhere in the reported history of the state for an attempted burglary under these circumstances. The trial court must find the sentence was disproportionate and set the sentence aside.

V. VERDICT IS CONTRARY TO THE LAW AND THE WEIGHT OF THE EVIDENCE

For the reasons stated above, the verdict rendered by the jury is contrary to the law and the weight of the evidence and must be set aside.

VI. DEFENDANT RESERVES RIGHT TO RAISE ADDITIONAL ISSUES.

The Defendant reserves the right to raise additional issues before the court once a complete record of the trial is made available to him.

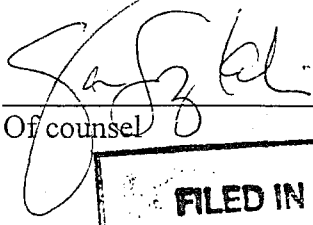
Respectfully submitted this the 13th day of February, 2004.

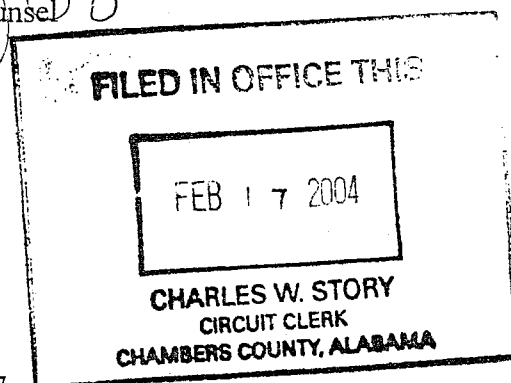

KYL A GROFFKELIM (GRO014)
Attorney for Defendant

Of counsel:
ALEC BROWN & ASSOCIATES, P.C.
P.O. Box 1977
Alexander City, AL 35011-1977
(256) 409-9001
(256) 409-9003 facsimile

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered to counsel for the state by placing a copy of the same addressed at his office address in the United States mail, First Class, Postage Prepaid on this the 13th day of February, 2004.


Of counsel



36

IN THE CIRCUIT COURT OF CHAMBERS COUNTY, ALABAMA

STATE OF ALABAMA

VS.

CHRISTOPHER McCULLOUGH

)
)
)
)
)

CASE NO. CC-02-318

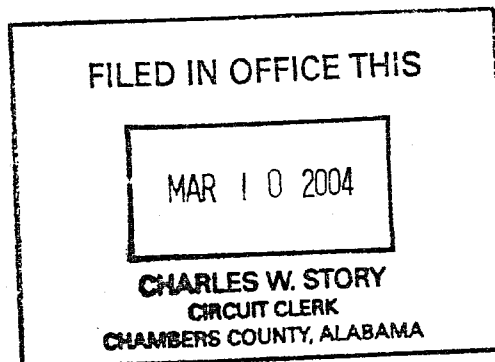
ORDER

After consideration, Defendant's Motion for New Trial is DENIED.

Let a copy of this Order issue to the defendant, counsel, and the District Attorneys Office.

Signed this the 10th day of March, 2004.


RAY D. MARTIN
CIRCUIT JUDGE



C. McCullough K. K. in DA

31

ACR0370
OPER: RHM
GE: 1ALABAMA JUDICIAL INFORMATION SYSTEM
CASE ACTION SUMMARY
CIRCUIT CRIMINAL

CASE: CC 2002 000318.00

RUN DATE: 09/05/2002

IN THE CIRCUIT COURT OF CHAMBERS

JUDGE: XXX

STATE OF ALABAMA

VS

MCCULLOUGH CHRISTOPHER
604 S 1ST AVE

CASE: CC 2002 000318.00

LANETT, AL 36863 0000

DOB: 11/27/1972 SEX: M RACE: B HT: 0 00 WT: 000 HR: EYES:
SSN: 912000270 ALIAS NAMES:CHARGE01: ATTEMPT - BURGLARY 1 CODE01: BUR1A LIT: ATTEMPT - BURG TYP: F #: 001
OFFENSE DATE: AGENCY/OFFICER: 0120000DATE WAR/CAP ISS:
DATE INDICTED: 08/05/2002
DATE RELEASED:
BOND AMOUNT: \$50,000.00DATE ARRESTED: 08/26/2002
DATE FILED: 09/05/2002
DATE HEARING:
SURETIES:DATE 1: 09/23/2002 DESC: ARRG
DATE 2: DESC:TIME: 0900 A
TIME: 0000

TRACKING NOS: GJ 2002 000270 00 /

/

DEF/ATY: ~~Steve Morris~~

TYPE:

TYPE:

~~Nick Woods~~
Kyra Kelim 00000

00000

PROSECUTOR:

WITH CSE: GJ200200027000 CHK/TICKET NO: GRAND JURY: 270
COURT REPORTER: SID NO: 0000000000
DEF STATUS: JAIL DEMAND: OPER: RHM

TRANS DATE	ACTIONS, JUDGEMENTS, AND NOTES	OPER
09/05/2002	ASSIGNED TO: (XXX) (AR01)	RHM
09/05/2002	CHARGE 01: ATTEMPT - BURGLARY 1/#CNTS: 001 (AR01)	RHM
09/05/2002	BOND SET AT: \$50000.00 (AR01)	RHM
09/05/2002	DEFENDANT INDICTED ON: 08/05/2002 (AR01)	RHM
09/05/2002	SET FOR: ARRAIGNMENT ON 09/23/2002 AT 0900A (AR01)	RHM
09/05/2002	INITIAL STATUS SET TO: "J" - JAIL (AR01)	RHM
09/05/2002	FILED ON: 09/05/2002 (AR01)	RHM
09/05/2002	DEFENDANT ARRESTED ON: 08/26/2002 (AR01)	RHM
09/05/2002	CASE ACTION SUMMARY PRINTED (AR08)	RHM
9/23/02	Plea of not guilty + waiver of Arrg.	
10/17/02	Plea 10/17/02.	
10/17/02	T 11/4/02	
11/26/02	Conv T 12/9/02.	
3/13/03	Plea Set 4/15/03.	
3/31/03	Motion to withdraw Steve Morris	
4/1/03	Order - Motion to withdraw S. Morris is	
	granted. Appoints Nick Woods	
4/10/03	Order - Motion to withdraw N. Woods granted	

4/15/03 T 5/5/03.

4/24/03 Request by Def for Production by State.

9/23/03 Set Plea 10/16/03.

10/16/03 T 11/3/03

10/16/03 Order - Obtain Custody of Def for Trial.

11/3/03 Motions in Limine.

11/4/03 Order - Obtain Custody of Def.

11/14/03 Jury Verdict - Guilty.

Sentencing 12/14/03 @ 1:00pm.

12/18/03 Order - Court Sent Jan 15, 2004.

Obtain Custody of Def. for hearing.

1/21/04 Order - Sentencing order
40 years.

2/17/04 Motion for New Trial.

3/10/04 Order - Motion for New
Trial is denied.

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IN THE CIRCUIT COURT OF CHAMBERS COUNTY
AT LAFAYETTE, ALABAMA

STATE OF ALABAMA,)

Plaintiff,)

vs.)

CASE NO.: CC 02-³¹⁸~~304~~

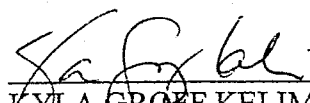
CHRISTOPHER MCCULLOUGH,)

Defendant.)

NOTICE OF APPEAL

COMES NOW, the Defendant and hereby files his notice of appeal, whereby he appeals the conviction imposed upon him as a result to a jury verdict of guilty rendered on November 14, 2003, and the sentence of forty years imprisonment imposed upon him on or about January 15, 2004. The defendant filed a motion for new trial on or about February 17, 2004 and the Court denied the motion on or about March 10, 2004.

Respectfully submitted this the 31st day of March, 2004.



KYLA GROFF KELIM (GRO014)

Attorney for Defendant

Christopher McCullough

Of counsel:

ALEC BROWN & ASSOCIATES, P.C.

P.O. Box 1977

Alexander City, AL 35011-1977

(256) 409-9001

(256) 409-9003 facsimile

FILED IN OFFICE THIS

APR 1 2004

CHARLES W. STORY
CIRCUIT CLERK
CHAMBERS COUNTY, ALABAMA

40

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served counsel for the State, Bill Lisenby, in the foregoing matter with a true and correct copy of the foregoing document by hand delivery or by mailing a copy thereof, postage prepaid to him at his respective address of Post Office Box 609, Lafayette, Alabama 36862 via United State's Mail, postage prepaid to him on this the 31st day of March, 2004.



Kyla G. Kelim
Alec Brown & Associates, P.C.
217 Madison Street
P.O. Box 1977
Alexander City, Alabama 35011-1977
(256) 409-9001
(256) 409-9003 facsimile
Attorney for Defendant

State of Alabama
Unified Judicial System

Form ARAP-26 (front) 8/91

COURT OF CRIMINAL APPEALS
DOCKETING STATEMENT

Criminal Appeal Number

GENERAL INFORMATION:

☒ CIRCUIT COURT ☐ DISTRICT COURT ☐ JUVENILE COURT OF CHAMBERS COUNTY COUNTY
CHRISTOPHER MCCULLOUGH, Appellant

V. ☒ STATE OF ALABAMA ☐ MUNICIPALITY OF _____

Case Number <u>CC 02-318</u>	Date of Complaint or Indictment <u>8/5/02</u>	Date of Judgment/Sentence/Order <u>11/14/03 / 11/15/04 / 1/21/04</u>
Number of Days of Trial/Hearing <u>2</u> Days	Date of Notice of Appeal Oral: _____ Written: <u>4/1/04</u>	
Indigent Status Requested: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		
Indigent Status Granted: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		

B. REPRESENTATION:

Is Attorney Appointed or Retained? ☒ Appointed ☐ Retained. If no attorney, will appellant represent self? ☐ Yes ☐ No

Appellant's Attorney (Appellant if pro se) (Attach additional pages if necessary)

Kyla Groff Kelim

Address

P.O. Box 1977

City

Alexander City

Telephone Number

(256) 409-9001

State

AL

Zip Code

35010

C. CODEFENDANTS: List each CODEFENDANT and the codefendant's case number.

Codefendant <u>Billy Norris</u>	Case Number <u>CC 02-319</u>
Codefendant	Case Number
Codefendant	Case Number

D. TYPE OF APPEAL: Please check the applicable block.

- 1 ☒ State Conviction
 2 ☐ Post-Conviction Remedy
 3 ☐ Probation Revocation
 4 ☐ Pretrial Order
 5 ☐ Contempt Adjudication
 6 ☐ Municipal Conviction
 7 ☐ Juvenile Transfer Order
 8 ☐ Juvenile Delinquency
 9 ☐ Habeas Corpus Petition
 10 ☐ Other (Specify) _____

E. UNDERLYING CONVICTION/CHARGE: Regardless of the type of appeal checked in Section D, please check the box beside each offense category for which the appellant has been convicted or charged as it relates to this appeal. Also include the applicable section of the Code of Alabama for State convictions.

- | | | |
|---|--|---|
| 1 <input type="checkbox"/> Capital Offense - § _____ | 6 <input type="checkbox"/> Trafficking in Drugs - § _____ | 11 <input type="checkbox"/> Fraudulent Practices - § _____ |
| 2 <input type="checkbox"/> Homicide - § _____ | 7 <input type="checkbox"/> Theft - § _____ | 12 <input type="checkbox"/> Offense Against Family - § _____ |
| 3 <input type="checkbox"/> Assault - § _____ | 8 <input type="checkbox"/> Damage or Intrusion to Property - § _____ | 13 <input type="checkbox"/> Traffic - DUI - § _____ |
| 4 <input type="checkbox"/> Kidnapping/Unlawful Imprisonment - § _____ | 9 <input type="checkbox"/> Escape - § _____ | 14 <input type="checkbox"/> Traffic - Other - § _____ |
| 5 <input type="checkbox"/> Drug Possession - § _____ | 10 <input type="checkbox"/> Weapons/Firearms - § _____ | 15 <input type="checkbox"/> Miscellaneous (Specify): <u>Attempted Burglary - § 13A-7-5, 13A-4-2</u> |

F. DEATH PENALTY:

Does this appeal involve a case where the death penalty has been imposed? ☐ Yes ☒ No

G. TRANSCRIPT:

Will the record on appeal have a reporter's transcript? ☒ Yes ☐ No

If the answer to question "1" is "Yes," state the date the Reporter's Transcript Order was filed. 4/8/04 (Date)

3. If the answer to question "1" is "No":

(a) Will a stipulation of facts be filed with the circuit clerk? ☐ Yes ☐ No

(b) Will the parties stipulate that only questions of law are involved and will the trial court certify the questions? ☐ Yes ☐ No

NOTE: If the appeal is from the district or juvenile court and the answer to question "1" is "No," then a positive response is required for question 3(a) or 3(b).

Form ARAP-26 (back) 8/91

COURT OF CRIMINAL APPEALS DOCKETING STATEMENT

H. POST-JUDGMENT MOTIONS: List all post-judgment motions by date of filing, type, and date of disposition (whether by trial court order or by the provisions of Rules 20.3 and 24.4 (ARCrP)):

DATE OF FILING			TYPE OF POST-JUDGMENT MOTION	DATE OF DISPOSITION		
Month	Day	Year		Month	Day	Year
2	17	2004	Motion for New Trial	3	10	2004

I. NATURE OF THE CASE: Without argument, briefly summarize the facts of the case.

On 3/19/2002, Appellant and co-defendant were arrested in proximity to the land of the victims. Occupants in victims home alleged two black males wearing ski masks were seen in area of the home.

J. ISSUE(S) ON APPEAL: Briefly state the anticipated issues that will be presented on appeal. (Attach additional pages if necessary.)

- I. NO overt act proven sufficient to prove Attempted Burglary.
- II. No Independent Corroboration of Co-defendant's testimony.
- III. Court erred in failing to instruct jury on lesser included offense of Criminal Trespass in the Third Degree.
- IV. Appellant's sentence disproportionate and excessive.
- V. Verdict was contrary to the law + the evidence.
- VI. All other issues of record reserved.

K. SIGNATURE:

Date

4/8/07

Signature of Attorney/ Party Filing this Form

State of Alabama Unified Judicial System Form ARAP-1C 8/91	REPORTER'S TRANSCRIPT ORDER -- CRIMINAL See Rules 10(c) and 11(b) of the Alabama Rules of Appellate Procedure (A.R. App.P.)	Criminal Appeal Number 43
--	--	------------------------------

TO BE COMPLETED BY COUNSEL FOR THE APPELLANT OR BY THE APPELLANT IF NOT REPRESENTED AND FILED WITH THE WRITTEN NOTICE OF APPEAL OR FILED WITHIN 7 DAYS AFTER ORAL NOTICE OF APPEAL IS GIVEN.

☒ CIRCUIT COURT ☐ DISTRICT COURT ☐ JUVENILE COURT OF CHAMBERS COUNTY COUNTY
CHRISTOPHER M C WILLOUGH, Appellant

v. ☒ STATE OF ALABAMA ☐ MUNICIPALITY OF _____

Case Number

CC 02-318

Date of Judgment/Sentence/Order

Date of Notice of Appeal

Oral:

Written:

4/1/04

Indigent Status Granted:

☒ Yes

☐ No

PART 1. TO BE SIGNED IF THE APPEAL WILL NOT HAVE A COURT REPORTER'S TRANSCRIPT:

I CERTIFY THAT NO REPORTER'S TRANSCRIPT IS EXPECTED AND THAT THE RECORD ON APPEAL SHALL CONSIST OF THE CLERK'S RECORD ONLY. IF THE APPEAL IS FROM DISTRICT COURT OR JUVENILE COURT, I ALSO CERTIFY (1) THAT A STIPULATION OF FACTS WILL BE INCLUDED IN THE CLERK'S RECORD AND THAT THE APPELLANT WAIVES HIS RIGHT TO A JURY TRIAL IF SO ENTITLED; OR (2) THAT THE PARTIES HAVE STIPULATED THAT ONLY QUESTIONS OF LAW ARE INVOLVED AND THAT THE QUESTIONS WILL BE CERTIFIED BY THE JUVENILE/DISTRICT COURT FOR INCLUSION IN THE CLERK'S RECORD (SEE RULE 28(A)(1), ALABAMA RULES OF JUVENILE PROCEDURE, AND §12-12-72, CODE OF ALABAMA 1975).

Signature

Date

Print or Type Name

PART 2. DESIGNATION OF PROCEEDINGS TO BE TRANSCRIBED. Request is hereby made to the court reporter(s) indicated below for a transcript of the following proceedings in the above referenced case (see Rule 10(c)(2), Alabama Rules of Appellate Procedure (A.R.App.P.)):

MARK PROCEEDINGS REQUESTED:

- A. ☒ TRIAL PROCEEDINGS - Although this designation will include the judgment and sentence proceedings, a transcript of the organization of the jury and arguments of counsel must be designated separately.
- B. ☐ ORGANIZATION OF THE JURY - This designation will include voir dire examination and challenges for cause. Note that in noncapital cases the voir dire of the jury will not be recorded unless the trial judge so directs. (See Rule 19.4, ARCP.)
- C. ☐ ARGUMENTS OF COUNSEL - Note that in noncapital cases the arguments of counsel will not be recorded unless the trial judge so directs. (See Rule 19.4, ARCP.)

COURT REPORTER(S)

FRANCES ROARK

P.O. Box 763

Wedowee, AL 36278

IN ADDITION TO ANY PROCEEDINGS DESIGNATED ABOVE, SPECIAL REQUEST IS HEREBY MADE TO INCLUDE THE FOLLOWING PROCEEDINGS IN THE REPORTER'S TRANSCRIPT PORTION OF THE RECORD ON APPEAL. (ATTACH ADDITIONAL PAGES IF NECESSARY):

ADDITIONAL PROCEEDINGS REQUESTED	DATE	COURT REPORTER(S)
D. _____	_____	_____
E. _____	_____	_____
F. _____	_____	_____
G. _____	_____	_____

IMPORTANT NOTICE: The court reporter who reported the proceedings for which a transcript is requested must be identified on this form to be effective. Additionally, it is important to note that the appellant may not be permitted to raise any issue on appeal relating to any proceedings the case that are not specifically designated on this form for inclusion in the reporter's transcript. A general designation such as "all proceedings" is not sufficient. (See Rule 10(c)(2), A.R.App.P.)

PART 3. MUST BE SIGNED IF THE APPEAL WILL HAVE A COURT REPORTER'S TRANSCRIPT:

I CERTIFY THAT I HAVE DISTRIBUTED THIS FORM AS SET OUT BELOW. I ALSO CERTIFY (1) THAT I HAVE MADE SATISFACTORY FINANCIAL ARRANGEMENTS WITH EACH COURT REPORTER LISTED ABOVE FOR PREPARING HIS OR HER PORTION OF THE REPORTER'S TRANSCRIPT HEREIN REQUESTED; OR (2) THAT THE APPELLANT PROCEEDED AT TRIAL AS AN INDIGENT AND THAT THAT STATUS HAS NOT BEEN REVOKED; OR, (3) THAT THE APPELLANT HAS BEEN GIVEN PERMISSION TO PROCEED ON APPEAL IN FORMA PAUPERIS.

Signature

Date

Print or Type Name

Ja for la

4/8/04

KYLA GROFF ICEUM

DISTRIBUTION: Original filed with Clerk of Trial Court and copies mailed to: (1) Clerk of the Court of Criminal Appeals, (2) the District Attorney, (3) the Attorney General or the municipal prosecutor in lieu of the District Attorney and the Attorney General if the appeal is from municipal conviction, and (4) to each Court Reporter who reported proceedings designated for inclusion in the reporter's transcript.

State of Alabama Unified Judicial System m ARAP-14 Rev. 11/91	CERTIFICATE OF COMPLETION AND TRANSMITTAL OF RECORD ON APPEAL BY TRIAL CLERK	Appellate Case Number
--	---	-------------------------------

TO: THE CLERK OF THE COURT OF CRIMINAL APPEALS OF ALABAMA	DATE OF NOTICE OF APPEAL: <u>April 1 2004</u>
APPELLANT <u>Christopher McCullough.</u>	
v. STATE OF ALABAMA	

I certify that I have this date completed and transmitted herewith to the appellate court the record on appeal by assembling in (a single volume of _____ pages) (1 volumes of 200 pages each and one volume of 109 pages) the clerk's record and the reporter's transcript and that one copy each of the record on appeal has been served on the defendant and the Attorney General of the State of Alabama for the preparation of briefs.

I certify that a copy of this certificate has this date been served on counsel for each party to the appeal.

DATED this 1 day of June, 2004.

Chad W. Smith
Circuit Clerk

1 IN THE FIFTH JUDICIAL CIRCUIT

2 IN AND FOR CHAMBERS COUNTY

3 LAFAYETTE, ALABAMA

4
5 STATE OF ALABAMA

6 VS

CC 02-318

7 CHRISTOPHER MCCULLOUGH

8 Defendant

COPY

9
10
11 BEFORE: Judge Howard Ray D. Martin and jury
12 November 13 & 14, 2003, 9:00 a.m.

13
14 APPEARANCES

15 FOR THE STATE:

16 Mr. Bill Lisenby

17 Ms. Amy Newsome

18 FOR THE DEFENDANT:

19 Ms. Kyla Kelium

20
21
22
23
24 Frances P. Looney, CSR, RPR

25 Official Court Reporter

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VERDICT: 244

1 THE COURT: Calling for trial the case of
2 State of Alabama versus Christopher McCullough,
3 case number CC 02-318. What says the State?

4 MR. LISEBY: State is ready, Your Honor.

5 THE COURT: What says the defense?

6 MS. KELIUM: Defense is ready, Your Honor.

7 THE COURT: Ladies and gentlemen, I'll need
8 for all of you to stand where you are and raise
9 your right hands.

10 (JURY SWORN)

11 THE COURT: This case is brought by way of
12 indictment. And as I have told all of you before
13 the indictment in this case is not evidence. It
14 is the formal means by which a case is brought
15 before you for trial. It is the formal procedure
16 by which a defendant is charged with a crime and
17 brought before you as I said for trial. The
18 indictment reads as follows: The grand jury of
19 said county charge that before the finding of this
20 indictment Christopher McCullough did with the
21 intent to commit the crime of burglary first
22 degree Section 13A-7-5 of the Code of Alabama
23 attempt to commit said offense by attempting to
24 knowingly and unlawfully enter or remain
25 unlawfully in a dwelling of another, that being,

1 Mike Gragg with intent to commit a therein, to
2 wit: theft and while effecting entry or while in
3 the dwelling or immediate flight therefrom the
4 said Christopher McCullough was armed with an
5 explosive or a deadly weapon that being a pistol a
6 further description of which is otherwise unknown
7 to the grand jury in violation of Section 13A-4-2
8 of the Code of Alabama against the peace and
9 dignity of the State of Alabama, signed Rea S.
10 Clark, District Attorney.

11 As I said before the indictment in this case
12 is not evidence, but it is the formal method of
13 charging a defendant with a crime and bringing
14 that person before you for trial.

15 Now, first I'm going to ask for the State to
16 identify those persons that will be acting on the
17 State's behalf in prosecution of this cause.

18 MR. LISEBY: Thank you, Your Honor. Good
19 morning. My name is Bill Lisenby. I'm the Chief
20 Assistant District Attorney here for the Fifth
21 Circuit along with Amy Newsome who is the
22 Assistant District Attorney here in Chamber County
23 will be prosecuting this case. Mr. Mike Gragg is
24 the alleged victim in this case. And his wife
25 Judith Gragg is back here. If you want me to,

1 Your Honor, I'll just go ahead and introduce the
2 potential witnesses?

3 THE COURT: Please do.

4 MR. LISEBY: Other potential witnesses in
5 this case are Ola Peril Trammell. Stand for me,
6 please. Bobby Bettis, Lincoln Whaley, Rick Brown,
7 Richard Carter also with the Lanett Police
8 Department. I think he stepped out of the
9 courtroom right now. Individual by the name of
10 Billy Norris also potentially will testify. Our
11 investigator will be in and out is Jeff Chandler
12 whose office is actually over in Alexander City.
13 But he works all four counties in the circuit.

14 THE COURT: And the same for defense.

15 MS. KELIUM: My name is Kyla Kelium. I know
16 you have got to see me the last week or so. I
17 practice in Alexander City with Alec Brown. He
18 couldn't be here today. He's sorry. With me is
19 Chris McCullough of Lanett. Thank you.

20 THE COURT: Ladies and gentlemen, are any of
21 you related by blood or marriage to the defendant,
22 his attorney, to any of the prosecutors, or to the
23 persons identified by the prosecution as working
24 with the state in the prosecution of this case?
25 Are any of you related by blood or marriage to any

1 of those persons that have been identified?

2 I think Investigator Carter if you would
3 stand, please, sir. Investigator Carter will also
4 be involved in the prosecution of this case. Are
5 any of y'all related by blood or marriage to any
6 of these identified individuals?

7 MR. LISEBY: Judge, I'm sorry. There's one
8 other individual that came in, too, Investigator
9 Jeff Blackstone with the sheriff's department.

10 THE COURT: Anyone related by blood or
11 marriage to any of these folks? Have each of you
12 been a resident householder of Chambers County for
13 the last six months?

14 Have any of you been indicted within the last
15 12 months for the felony offense for attempted
16 burglary first degree or for any similar offense
17 as that with which this defendant is charged?

18 Do any of you have an interest in the
19 conviction or acquittal of the defendant, or have
20 you made any promise or given any assurance that
21 you will either convict or acquit this defendant?

22 Do any of you have a fixed opinion as to the
23 guilt or innocence of the defendant which would
24 bias your verdict one way or the other?

25 Now, I expect that the State's allegations

1 brought in this indictment alleged that this
2 offense occurred on or about March 19th year 2002
3 at a residence on Country Club Road that being
4 3622 Country Club Road in Lanett, Chambers County,
5 Alabama.

6 Are any of you a witness or a potential
7 witness in this case?

8 The indictment itself was returned by the
9 grand jury of Chambers County for the fall term
10 year 2002. Were any of you a member of the
11 Chambers County grand jury for the fall term year
12 2002?

13 Do any of you have a fixed opinion against
14 imprisonment in the penitentiary?

15 Would each of you convict on circumstantial
16 evidence?

17 Do any of you know anything about the facts
18 of this case which would influence your verdict
19 one way or the other?

20 Do any of you know of any reason why you if
21 selected as a juror in this case could not give
22 both the state and the defendant a fair and
23 impartial trial?

24 Ladies and gentlemen, the attorneys for both
25 State and defense will have certain questions for

1 you now. At the conclusion of all questions by
2 counsel if there's something that you think might
3 affect your ability to serve as a fair and
4 impartial juror in this case, I'll give you an
5 opportunity to come up here and tell me about that
6 in private. Any questions from the State?

7 MR. LISENBY: Yes, Your Honor, thank you.

8 Good morning. I want to do the same thing
9 that you did last Monday because I was in here and
10 have not had an opportunity to do that. As I said
11 my name is Bill Lisenby. I'm the Chief Assistant
12 District Attorney here in the Fifth Circuit. My
13 wife's name is Carol. She is formally Carol
14 Bishop from Five Points. She's a housewife. We
15 have one adult daughter who's 19. Her name is
16 Samantha. She works down in the 911 dispatch
17 center. You know a little bit about me. We know
18 a little bit about you. Ms. Newsome has taken
19 some very good notes. So I have only a few
20 questions I need to ask. But if you do have a
21 response we need you to stand for us for the court
22 reporter to get your name first and your response.

23 Is there any member of the panel that knows
24 the defendant in this case Chris McCullough?

25 Anyone know Mr. McCullough? Several hands. I

1 don't see any on the first two rows. On the third
2 row. Yes, ma'am, your name, please?

3 JUROR: My name is Janice Jackson. I know
4 Christopher's mom. Their family stay sort of in
5 the neighborhood. Normally I used to see him
6 walking the streets.

7 MR. LISEBY: When you say you know his
8 mother are the two of you friends?

9 JUROR: No.

10 MR. LISEBY: Know her from the neighborhood
11 also?

12 JUROR: Right.

13 MR. LISEBY: Follow-up question for you in
14 just a moment. Your name?

15 JUROR: Denise Ray. I know Christopher going
16 to school. He a couple of grades ahead of me in
17 school.

18 MR. LISEBY: Ms. Ray. Would you consider
19 yourself a friend of Mr. McCullough's?

20 JUROR: No.

21 MR. LISEBY: Just an acquaintance through
22 school?

23 JUROR: Yes.

24 MR. LISEBY: Have you seen him since then?

25 JUROR: Not really.

1 MR. LISENBY: Anyone else on that same row?

2 Next row? Yes, sir.

3 JUROR: Me and Christopher went to school
4 together.

5 MR. LISENBY: Your name, please.

6 JUROR: Timothy Farmer.

7 MR. LISENBY: Were you in the same grade?

8 JUROR: Might be. I can't remember.

9 MR. LISENBY: Would you consider him a friend
10 of yours?

11 JUROR: Not really.

12 MR. LISENBY: Just an acquaintance. Have you
13 seen him since then?

14 JUROR: No.

15 MR. LISENBY: Anyone else on the same row
16 with Mr. Farmer? Next row? Another hand? Yes,
17 ma'am, your name, please?

18 JUROR: Williams.

19 MR. LISENBY: How is it that you know Mr.
20 McCullough?

21 JUROR: I grew up with him, been knowing him
22 since childhood.

23 MR. LISENBY: Do you still have some contact
24 with him?

25 JUROR: No.

1 MR. LISENBY: Would you consider him a
2 friend of yours?

3 JUROR: No.

4 MR. LISENBY: How long ago would you say the
5 last time you had seen him, your best judgment?

6 JUROR: Probably about a year and a half ago.

7 MR. LISENBY: Thank you, ma'am. Anyone else
8 that knows Mr. McCullough? I'll go ahead and
9 expand that. Already had one response about
10 knowing his family. Any of you know Mr.
11 McCullough's family members? Ms. Williams,
12 again. Okay. Ms. Jackson, you knew his mother;
13 is that right?

14 JUROR: Yes.

15 MR. LISENBY: Do you recall her name by any
16 chance?

17 JUROR: Yes, it's Bobbie McCullough.

18 MR. LISENBY: Thank you. Anyone happen to
19 know Bobbie McCullough, sound familiar to you?
20 Ms. Williams. Anyone else? See no other
21 response. Go ahead and ask those four people Mr.
22 Farmer, Ms. Jackson, Ms. Williams, and Ms. Ray,
23 would the fact that you know Mr. McCullough or a
24 family member of his family or had some
25 acquaintance with him would that cause you any

1 problem sitting on a jury and trying to decide
2 whether he were guilty or not guilty of this
3 crime? Ms. Williams, no. Mr. Farmer is shaking
4 his head no. Ms. Jackson?

5 JUROR: No.

6 THE COURT: And I saw a hand was that a yes
7 or no?

8 JUROR: No.

9 MR. LISEBY: Thank you, Ms. Ray. I have
10 mentioned the name, the individual is not here.
11 His name is Billy Norris who may testify during
12 the course of this trial. Any member of the panel
13 that knows Billy Norris or any of his family
14 members? Ms. Williams. Okay. Tell me about that
15 Ms. Williams.

16 JUROR: My dad married his mom.

17 MR. LISEBY: Are they still together?

18 JUROR: Yes.

19 MR. LISEBY: Anyone else know Mr. Norris or
20 any of his family members? Ms. Williams, let me
21 ask you this, would the fact that Mr. Norris may
22 be a witness in this case, would that cause you
23 any problems sitting on a jury?

24 JUROR: No.

25 MR. LISEBY: You have been introduced to Ms.

1 Keli she is a defense attorney here. She works
2 with Alec Brown over in Alexander City. But she
3 and Mr. Brown come over here to Chambers County
4 and other places. So I have a question is there
5 any member of the panel that knows Ms. Kelium or
6 Mr. Brown on a personal level, went to the same
7 school together, children in school together,
8 clubs, church, anything of that nature? Anyone
9 know Ms. Kelium or Mr. Brown? No response to
10 that.

11 Is there any member of the panel or a family
12 member to your knowledge that's ever had any legal
13 work done for you by Ms. Kelium or Mr. Brown? No
14 response to that.

15 Now, I identified several individuals who are
16 seated over here. A couple of them have police
17 officer uniforms on. They're members or former
18 members of the Lanett Police Department. I have a
19 broad question. Then I'll narrow it down a little
20 bit. Is there any member of the panel that's ever
21 had a problem with any member of the Lanett Police
22 Department? That could be something involving a
23 case that came up or you got stopped for speeding,
24 you didn't like the way the police officer treated
25 you or maybe even something that was private in

1 natural, some kind of contract that maybe didn't go
2 well, you had some animosity somewhere? Any
3 member had any problems with the Lanett Police
4 Department? I see no response to that.

5 I want to be specific and ask you again
6 whether it be on a level involving police officers
7 or private in nature such as a contract dispute,
8 children got into a fight at school, anything of
9 that nature? Anyone have any problems or a family
10 member ever had any problems with Lincoln Whaley
11 or Richard Carter, Robbie Bettis, Rick Brown,
12 Steven Wood, those are all the Lanett Police
13 Department, and expand it to Jeff Blackstone who
14 works with the Chambers County sheriff's
15 department? Any problems with any of those
16 individuals? No response to that.

17 If you do have a response to these questions
18 and you don't want to just say it out loud, it's
19 quite all right. At the very end of my questions
20 and Ms. Kelium questions for you to come up and
21 approach the judge if there's something you think
22 about and don't want to respond out in public we
23 all understand that. I'm not trying to embarrass
24 anyone, trying to get some information. If you
25 think about something just let us know. Let me

1 ask a broad question again. I think there have
2 been some responses to this in the past and
3 because this record in this case is coming up, I
4 need to get those responses.

5 Is there any member of the panel that's had a
6 problem with any law enforcement officer that's
7 left kind of a bad taste in your mouth or that
8 you've had some concern about that? Tell me your
9 name.

10 JUROR: Priscilla Buzbee.

11 JUROR: Russell Ennis.

12 MR. LISEBY: Anyone else that had a response
13 to that? Judge, do you need those individuals to
14 come up front?

15 THE COURT: Yes.

16 MR. LISEBY: Want them to do that now?

17 THE COURT: Yes.

18 MR. LISEBY: Ms. Buzbee and Mr. Ennis come
19 up individually.

20 THE COURT: Go ahead.

21 (The following occurred at the bench
22 outside the hearing of the jury.)

23 MR. LISEBY: Ms. Buzbee, I know that you
24 have responded to this earlier in this term. But
25 for this record could you explain again what your

1 prob m was?

2 JUROR: Yes, sir. My brother was hit by a
3 hit and run driver. And he nearly died from the
4 accident. And during the course of the time that
5 he was in the hospital, he was in the hospital for
6 two months in intensive care, and from there to
7 Warm Springs two months. He had to have some
8 therapy done in Columbus. The police never did
9 solve the case. A name was turned in, but they
10 never done anything about it.

11 MR. LISENBY: Which department was that?

12 JUROR: Valley.

13 MR. LISENBY: Valley Police Department.

14 JUROR: Yes, sir. During the time each time
15 we tried to find out information we would have to
16 go ourselves. They never called us to give us any
17 information, so the case was left unsolved.

18 MR. LISENBY: How long ago was that?

19 JUROR: It was two years ago.

20 MR. LISENBY: Two years.

21 JUROR: Yes, sir. It left my brother with a
22 limp. He almost died from the accident.

23 MR. LISENBY: Is he doing better now?

24 JUROR: Yes, sir, doing better.

25 MR. LISENBY: If you were to sit as a juror

1 in t^os case and listen to law enforcement
2 officers, these officers are not from the Valley
3 Police Department, but they're from the Lanett
4 Police Department and the sheriff's office, would
5 that cause you some problems in listening to their
6 testimony and making a determination --

7 JUROR: I don't think so.

8 MR. LISENBY: You think you would be okay
9 listening to them?

10 JUROR: Yes, sir.

11 MR. LISENBY: Mr. Ennis, you had I believe
12 previously answered this question earlier on
13 another case; but for this record, can you tell
14 the Court again what your problem was with law
15 enforcement?

16 JUROR: The policeman that arrested me was
17 dishonest, and I feel like a policeman ought to be
18 honest.

19 MR. LISENBY: Which officer was that?

20 JUROR: Jerome Bailey.

21 MR. LISENBY: Was he with the sheriff's
22 office at that time or with the Valley Police
23 Department?

24 JUROR: Valley.

25 MR. LISENBY: About how long ago would that

1 have been?

2 JUROR: Probably been at least six years.

3 MR. LISENBY: There's going to be testimony
4 from law enforcement officers in this case. Do
5 you have a general dislike for law enforcement
6 officers, or do you think that would be limited to
7 just Officer Bailey?

8 JUROR: I wouldn't say all police, no. I
9 would hope that some of them are honest. I mean
10 if they ain't we're in trouble.

11 MR. LISENBY: Let me ask you this. If you
12 were to serve as a juror on this case and you had
13 to make determinations about things that law
14 enforcement officers said which obviously you
15 would listening to testimony, do you think that
16 you would be able to put out of your mind your
17 problem with Officer Bailey, or would that cause
18 you to lien one way or another?

19 JUROR: It could tend to make you lien to be
20 honest with you.

21 MR. LISENBY: That's all we want. I
22 appreciate that. That's exactly what we want is
23 you to be honest with us. Let's say, for example,
24 a law enforcement witness were to come in and
25 testify that the light was red and a non-law

1 enforcement witness were to come in and testify
2 that the light was green and you had to make a
3 determination about who was being truthful, would
4 you be -- because of your past problems with law
5 enforcement -- more inclined to believe the other
6 individual or less inclined to believe the police
7 officer because of that?

8 JUROR: Very possible.

9 MR. LISEBY: Again that's all we want is you
10 to be honest with us?

11 THE COURT: Thank you, sir. Any questions?

12 MS. KELIUM: No.

13 MR. LISEBY: Challenges now?

14 THE COURT: Go ahead.

15 MR. LISEBY: I'll go ahead and challenge Mr.
16 Ennis for cause based on his responses.

17 MS. KELIUM: He said he couldn't be fair?

18 THE COURT: Challenge granted.

19 MS. KELIUM: Also if you want to take it up
20 now there was a lady who said she was related by
21 marriage to one of the witnesses.

22 THE COURT: Who is that?

23 MS. KELIUM: Ms. Williams, her dad was
24 married to a witness' mother, still married now.

25 THE COURT: That's close enough. What's the

1 name. That will be granted relative of that
2 witness. Priscilla Eubanks.

3 MR. LISEBY: I'm going to go ahead and
4 challenge Ms. Buzbee for cause also. She was the
5 first lady that came up.

6 MS. KELIUM: She said she could be fair.

7 THE COURT: Denied.

8 (JURY PRESENT)

9 MR. LISEBY: Is there anyone else that has a
10 response to that question? Yes, ma'am.

11 JUROR: Anywhere we have a problem with law
12 enforcement?

13 MR. LISEBY: Yes, ma'am. You want to come
14 on up, please, ma'am?

15 THE COURT: Your name?

16 (The following occurred at the bench
17 outside the hearing of the jury.)

18 JUROR: Amy Stanford. And I'm paying a fine
19 now due to when a law officer told me in South
20 Cobb I was driving on a suspended tag. It was my
21 brother's car. And he asked me for some
22 information concerning my brother, and he would
23 give me a warning and let me go. But I found out
24 that I missed a court date. He actually wrote out
25 a ticket.

1 THE COURT: Would that have an effect on your
2 ability to sit on this jury which you will hear
3 testimony from law enforcement officers. Would
4 that affect your ability to serve?

5 JUROR: No, because the law officers here
6 treated me okay even with the FTA when I was
7 arrested. I got an apology from a law officer in
8 Lanett.

9 THE COURT: Any questions?

10 MR. LISENBY: No.

11 MS. KELIUM: No.

12 THE COURT: Thank you.

13 (Jury present)

14 MR. LISENBY: Is there anyone else that had
15 a response to that question? No other responses.

16 Now, a person that has already identified
17 Billy Norris was also an individual charged in
18 this particular case who may testify during the
19 course of the trial. And he would be called a
20 co-defendant, an individual who was charged
21 jointly with Mr. McCullough. Mr. Norris has
22 already entered a guilty plea with regard to this
23 case and agreed to testify. My question to you is
24 there any member of the panel as you sit there
25 now -- of course, you don't know what the judge is

1 going to instruct you and that type of thing --
2 but just as you sit there now is there any member
3 of the panel that thinks it's inappropriate for
4 the State to make agreements with co-defendants to
5 testify in a trial? Okay. One response. Anyone
6 else? Sir, could you come up, please, sir?

7 (The following occurred at the bench
8 outside the hearing of the jury.)

9 THE COURT: Your name for the record?

10 JUROR: Joey Finley.

11 MR. LISENBY: Mr. Finley, of course, you
12 don't know anything about what the agreement was
13 or anything of that nature. But you indicated
14 that you had a problem with the State making
15 agreements with co-defendants to testify. Can you
16 tell us what your problem is with that, what your
17 feeling is about that?

18 JUROR: I sort of kind of feel like if they
19 were both were involved in it, then it's not right
20 for the other one to turn around and point the
21 finger and say, well, he was doing this or he did
22 that in compliance with the Court to get a lesser
23 plea. You're an adult. You know what you did.
24 You should go ahead and take what you did on your
25 part because he didn't make him do it.

1 MR. LISEBY: If Mr. Norris the co-defendant
2 in this case were to testify, would you be less
3 inclined to believe him because he had entered
4 into an agreement with the State to testify?

5 JUROR: No.

6 MR. LISEBY: Even though your feelings are
7 against that policy if he were to testify about
8 the case you're telling us you would be able to
9 evaluate his testimony along with all of the other
10 evidence?

11 JUROR: Yes, sir.

12 MR. LISEBY: And make a determination. If
13 it came to a point of where Mr. Norris testified
14 that the light was red and another witness were to
15 testify that the light was green, would you simply
16 because of your feelings about the fact that he
17 had an agreement with the State, would you be more
18 inclined to believe that other witness that
19 testified the light was green?

20 JUROR: No.

21 MR. LISEBY: So you would be fair and
22 impartial?

23 JUROR: Yes.

24 THE COURT: Any questions?

25 MS. KELIUM: No.

(Jury Present)

MR. LISENBY: Is there anyone else that had a response to that particular question now that you have had a chance to sit and think about it for a little bit? Any problems with it in your mind as you sit there now the fact that the state has made an agreement with an individual to testify in this case? No response to that.

Let me just ask it in kind of another way. Is there anyone that thinks because of that agreement, simply because of that, you would be less inclined to believe that individual than another person who testified? If you could come up front, please. And if there's anyone else that has a response to that, if you could just come on up front and line up.

(The following occurred at the bench outside the hearing of the jury.)

JUROR: James Wright.

MR. LISENBY: Okay, thank you, Mr. Wright. Mr. Wright, can you tell me what your feelings are about that?

JUROR: Well, if I got picked I didn't want to wait till then. I don't know. I just have a problem believing that they were conspirators. I

1 would have a problem believing what he said.

2 MR. LISEBY: Just because he was involved?

3 JUROR: Yes.

4 MR. LISEBY: If the judge were to give you
5 instructions about how to evaluate not only that
6 witness, but all witnesses and there was
7 information about how to evaluate a co-defendant's
8 testimony, would you be able to follow the law, or
9 do you think that because of your own feelings you
10 would have to disregard any of it?

11 JUROR: I would have no problem with the law.

12 MR. LISEBY: I don't want to get into what
13 the judge is going to instruct, okay. I'm just
14 going to do it in kind of a general term. But if
15 the law were to instruct you that you were to
16 evaluate all the witnesses' testimony and consider
17 it along with all of the other evidence in the
18 case and determine what weight, if any, and what
19 credibility to give, if any, to someone you would
20 be able to do that?

21 JUROR: I would be able to follow
22 instructions, yes.

23 MR. LISEBY: That would be despite your
24 feelings that initially you said you didn't think
25 you would be able to believe him because he was a

1 conspirator?

2 JUROR: If I had certain instructions on the
3 situation.

4 MR. LISEBY: You feel like you could do
5 that?

6 JUROR: Yes.

7 (Jury Present)

8 MR. LISEBY: Is there anyone else that after
9 they thought about it has a response to that
10 question? See no other responses to that.

11 The judge asked you a question about if
12 anyone knew about the facts of the case to the
13 extent that it would influence your verdict one
14 way or the other. I would like to know if there's
15 any member of the panel either at work or at
16 church or reading about it in the paper anything
17 on the radio anyone that knows anything about the
18 facts of the case at all? Anyone remember it? No
19 response to that.

20 Thank you very much. I believe that's all
21 the questions I have. Thank you, Your Honor.

22 THE COURT: Ms. Kelium.

23 MS. KELIUM: Good morning. Let me tell you a
24 little bit about myself. I guess you know I'm a
25 lawyer. And I practice in Alexander City. My

1 husband's name is Patrick Kelium. And he's a
2 marine technician at Kowaliga We have a two year
3 old son Paton and will have a little brother or
4 sister. I'm here today representing my client
5 Christopher McCullough. As you have heard already
6 he has a mother named Bobbie McCullough, two
7 brothers Marcus and Edmond McCullough. They're
8 all from the Valley area. Chris attended Valley
9 High School. Does anyone here know any of
10 Christopher's relatives? Already heard from Ms.
11 Jackson. The gentleman right there on the fourth
12 row.

13 JUROR: I went to high school with Edmond and
14 Marcus McCullough. Danny Smith.

15 MS. KELIUM: Anyone else responded? I have
16 you already, Ms. Ray. What's your name?

17 JUROR: Whitlow. I went to school with his
18 brother.

19 MS. KELIUM: Anybody else that I hadn't
20 already talked to. Ms. Whitlow and Mr. Smith, due
21 to your knowing Mr. McCullough's brothers would
22 you have any problem being fair and impartial in
23 this case involving Christopher?

24 JUROR: No.

25 MS. KELIUM: You have been asked if you're

1 related by brood or marriage to any of the law
2 enforcement officers that you were introduced to
3 over here, Mr. Ennis, Mr. Bettis, Investigator
4 Carter, Whaley, and Jeff Blackstone. Does anybody
5 know any of these officers? All right, Mr.
6 Finley.

7 JUROR: Yes.

8 MS. KELIUM: Who do you know?

9 JUROR: Officer Blackstone.

10 MS. KELIUM: How do you know him?

11 JUROR: From a case that my brother is
12 involved in.

13 MS. KELIUM: Yes, sir.

14 JUROR: I know Maye through some detective
15 work.

16 MS. KELIUM: What's your name?

17 JUROR: Michael Cotney.

18 JUROR: Patrol the streets, go up and down
19 the streets. I know most all of them.

20 MS. KELIUM: What's your name, sir?

21 JUROR: Lonnie Morgan.

22 MS. KELIUM: One other response.

23 JUROR: I know Richard Carter and Blackstone,
24 too.

25 MS. KELIUM: What's your name?

1 JUROR: Phil Slay.

2 MS. KELIUM: How do know him?

3 JUROR: Richard and I went to high school
4 together. He was about two years younger than I
5 was. Played football together. I know Blackstone
6 as a deputy.

7 MS. KELIUM: Mr. Slay, in your relationship
8 with Ms. Blackstone and Mr. Carter would you have
9 any problem being fair and impartial to Mr.
10 McCullough, or would you be more likely to believe
11 something that Mr. Carter and Blackstone might
12 say?

13 JUROR: It would not influence me either way.
14 Assume everything is right I will do what's right.
15 It don't matter if I have been knowing him a long
16 time.

17 MS. KELIUM: Due to your relationship with
18 either Mr. Blackstone or Mr. Carter would you be
19 more inclined to believe what they say if they
20 were to testify in this case?

21 JUROR: If I could see the evidence and
22 everything else like that.

23 MS. KELIUM: What I'm asking you is if they
24 got up and said light is green, somebody else says
25 the light is red, would you be more inclined to

1 believe them?

2 JUROR: That they said it was green, yes, I
3 guess.

4 MS. KELIUM: That's all I'm going to ask.
5 Mr. Cotney, same question to you. Would you be
6 more likely to believe the officers that you know?

7 JUROR: No, ma'am.

8 MS. KELIUM: Anyone else respond to that
9 question?

10 JUROR: I know Rick Brown from work related.
11 My name is Martha Milner.

12 MS. KELIUM: If Mr. Brown were to testify in
13 this case would you be more likely to believe him
14 because of your relationship with him than any
15 other witness?

16 JUROR: No.

17 MS. KELIUM: Fairly evaluate what he says?

18 JUROR: Yes.

19 MS. KELIUM: You don't think if he said the
20 light was green and somebody else said it was red,
21 you wouldn't be more inclined to believe Mr.
22 Brown?

23 JUROR: No.

24 MS. KELIUM: Anyone else?

25 JUROR: Morgan.

1 MS. KELIUM: Would you be more inclined to
2 believe any of the officers that you know from
3 patrolling if you heard from them on the stand?

4 JUROR: Really I'd listen to the facts.

5 MS. KELIUM: You believe you can be fair to
6 both sides?

7 JUROR: Fair to both.

8 MS. KELIUM: I don't have too many questions
9 for you today because I know you have been here a
10 very long time with all of us asking questions. I
11 have tried my hardest to be here every time you
12 have been here to go through this. I apologize I
13 was not here Friday. I don't know whether you
14 have been asked this before. Has anybody here
15 been the victim of a burglary, car, homes, or
16 office or anything like that? Yes, ma'am, Ms.
17 Buzbee.

18 JUROR: Yes.

19 MR. KELIUM: When did this happened?

20 JUROR: About three years ago.

21 MS. KELIUM: What happened?

22 JUROR: Someone broke into my van on my
23 driveway. We didn't find out until the next
24 morning.

25 MS. KELIUM: Something taken out of it?

1 JUROR: No. I guess -- I don't know what
2 they were looking for. But they told me the
3 pocket, inside the glove compartment, the
4 dashboard.

5 MS. KELIUM: So you had to get that repaired?

6 JUROR: Yes.

7 MS. KELIUM: Is that the only problem you
8 have ever had? Any problems being burglarized?

9 JUROR: Someone came into our house when we
10 was at work. They didn't really take anything.

11 MS. KELIUM: When did that happen?

12 JUROR: About seven years ago.

13 MR. KELIUM: Somebody else raised their hand.
14 Mr. Cotney.

15 JUROR: My house was broke into probably a
16 year ago.

17 MS. KELIUM: Was something taken?

18 JUROR: No, ma'am, pretty much they was
19 attempting to, one of my friends.

20 MS. KELIUM: Somebody you knew?

21 JUROR: My friend knew them. I didn't know
22 them on a personal level.

23 MS. KELIUM: Who else responded? Let's see.
24 On the fifth row, gray shirt.

25 JUROR: Yes, my house was under construction.

1 It was broken into.

2 MS. KELIUM: Anything taken?

3 JUROR: Some tools.

4 MS. KELIUM: What was your name, sir?

5 JUROR: Andrew Mask.

6 MS. KELIUM: How long ago was that?

7 JUROR: Early '90s.

8 MS. KELIUM: That the only problem you have
9 had with anybody breaking in?

10 JUROR: Yes.

11 MS. KELIUM: Gentleman?

12 JUROR: Leon Weathers, vehicle.

13 MS. KELIUM: Was something taken out of your
14 vehicle?

15 JUROR: Both times.

16 MS. KELIUM: How long ago?

17 JUROR: 15 or 20 years ago.

18 MS. KELIUM: Mr. Slay.

19 JUROR: I had a barn broke in one time and
20 stole some heaters and others things.

21 MS. KELIUM: How long ago was that?

22 JUROR: About eight years ago.

23 MS. KELIUM: I think back row, start over
24 there.

25 JUROR: Ed McLaughlin, stolen car.

1 MS. KELIUM: Sure.

2 JUROR: Yes.

3 MS. KELIUM: Pretty good, how long ago was
4 that?

5 JUROR: Late '70s.

6 MS. KELIUM: Ever find your car?

7 JUROR: Yes.

8 MS. KELIUM: Was it worth driving after that?

9 JUROR: Yes.

10 MS. KELIUM: Lady right there in the red
11 shirt.

12 JUROR: My flower shop was broken into, but I
13 think I left the door open. I think I invited
14 them in, took the cash register.

15 MS. KELIUM: Wow.

16 JUROR: Maybe a \$100 in change and money.

17 MS. KELIUM: When did that happen?

18 JUROR: Probably 12 years ago.

19 MS. KELIUM: You double check now, right?

20 JUROR: I got rid of the flower shop.

21 MS. KELIUM: What was your name again?

22 JUROR: Sylvia Fullerton.

23 MS. KELIUM: Mr. Finley.

24 JUROR: My house was burglarized. That's
25 been about three years ago.

1 MS. KELIUM: Did they take something?

2 JUROR: Yes.

3 MS. KELIUM: Lady back there.

4 JUROR: Peggy Combs. This was early '70s,
5 burglarized several times before we realized it.

6 MS. KELIUM: They had taken things out that
7 you just didn't know?

8 JUROR: Small items, charm bracelet was
9 realized then.

10 MS. KELIUM: Somebody you knew coming in
11 there?

12 JUROR: Employee of my husband's. He would
13 stay after work. I was at work. So he knew where
14 all of us were.

15 MS. KELIUM: Early '70s?

16 JUROR: Yes.

17 MS. KELIUM: My question for each of you who
18 responded, this case obviously you have heard the
19 charges of attempted burglary. Each of you that
20 have had these problems in the past, could you sit
21 on this jury and hear the facts of this case and
22 be fair. Ms. Buzbee?

23 JUROR: Yes, ma'am.

24 MS. KELIUM: Ms. Slay, could you be fair?

25 JUROR: Yes, ma'am.

1 MS. KELIUM: Mr. Finley?

2 JUROR: I'd rather not.

3 MS. KELIUM: Ms. Combs?

4 JUROR: Yes.

5 MS. KELIUM: Would you be able to be fair
6 given the fact that somebody was coming in your
7 house?

8 JUROR: Yes.

9 MS. KELIUM: Mr. Cotney?

10 JUROR: Yes, ma'am.

11 MS. KELIUM: Mr. McLaughlin?

12 JUROR: Yes.

13 MS. KELIUM: I think Mr. Withers, was it?

14 JUROR: Yes.

15 MS. KELIUM: You could be fair?

16 JUROR: Yes.

17 MS. KELIUM: Who else did I miss? Ms.
18 Fullerton?

19 JUROR: Yes.

20 MS. KELIUM: That is all the questions I have
21 today. Thank you very much.

22 THE COURT: Counsel.

23 (The following occurred at the bench
24 outside the hearing of the jury.)

25 THE COURT: That will be enough time. We'll

1 take the motions up after we get the jury back
2 here. What motions do you have?

3 MS. KELIUM: I had filed some motions in
4 limini.

5 THE COURT: That's it.

6 MR. LISEBY: Some of them are in the form
7 of motion to suppress.

8 THE COURT: There's a big difference in that.

9 MS. KELIUM: All in the form of motions to
10 suppress, they're stuff I don't want to come in.

11 THE COURT: Is it a motion in limini or a
12 motion to suppress?

13 MS. KELIUM: We want to suppress any evidence
14 of the other burglaries that he was involved in,
15 allegedly involved in at the same time.

16 THE COURT: That's a motion in limini.

17 MS. KELIUM: One he had been convicted from.
18 We want to suppress his statement that was taken
19 without his signature. There's about seven of
20 them I filed.

21 THE COURT: If it goes to the nature of
22 derogation of a constitutional right, then you're
23 looking at a motion to suppress. If you're
24 looking at an evidentiary question as to
25 admissibility under the rules, then you're going

1 under a motion in limini. The statement would be
2 suppress. The burglary in limini. I have not
3 seen what you actually filed.

4 MS. KELIUM: In this case we sort of
5 compressed.

6 THE COURT: What I'll do is during the trial
7 before the State can admit the statement, of
8 course, they can do it out of the presence of the
9 jury. If they can prove it's voluntary, then it
10 will come in.

11 MR. LISEBY: My preference will be to do
12 that before opening statements if we're going to
13 have to do something along those lines.

14 THE COURT: Let's get the jury struck. Can
15 y'all have it ready by 10:30, or do I need to
16 limit the number of jurors?

17 MR. LISEBY: I think we can do it by 10:30.

18 (Jury Present)

19 THE COURT: Ladies and gentlemen, at this
20 time we're ready for the attorneys and Mr. Story
21 to go through the selection process. I'll need
22 you back in here at 10:30. Be back in here at
23 10:30 and we'll call the jury up to the box.
24 Thank you. Everyone remain in while the jury
25 exits. One alternate.

(Jury not present)

MS. KELIUM: Challenge for cause on Finley?

THE COURT: Bill, I want to make sure you know I'm going to grant the challenge for cause on Finley.

MR. LISEBY: Okay.

MS. KELIUM: Bill, I have one more. Mr. Slay answered that he would give the police officer's testimony more weight.

THE COURT: He did. Granted.

(JURY OF 12 STRUCK PLUS TWO ALTERNATES)

THE COURT: Please come forward and have a seat in the jury box as your name is called.

(Jury of 14 placed in box)

THE COURT: Ladies and gentlemen on the jury, I'll need for all of you to stand where you are in the jury box and raise your right hands.

(JURY SWORN)

THE COURT: The main instruction that I'm going to give you at this time is for you to have no conversation with anyone about this case. Do not discuss this case with anyone not even amongst yourselves. Don't allow anyone to engage you in conversation about this case. You cannot even discuss the case amongst yourselves as jurors

1 until all evidence has been presented and until I
2 charge you with the law that applies to this
3 case. After I charge you on the law at the
4 conclusion of the trial I'll send you back to the
5 jury room and that is when you will be free, of
6 course, to discuss the case and deliberate and
7 reach your verdict.

8 Now, with that I've got some matters to take
9 up both with the jury venire and with the
10 attorneys. If it goes very long I will have Mr.
11 Story notify you and allow y'all to be more at
12 liberty at a brief break or recess. Until then if
13 you would just wait in the jury room. And I'll be
14 with you in a few minutes.

15 (JURY NOT PRESENT)

16 THE COURT: Ms. Kelium, you have a motion to
17 suppress the defendant's statement?

18 MS. KELIUM: I do.

19 THE COURT: Let's go ahead and deal with that
20 now.

21 MR. LISEBY: Actually she's got seven
22 motions. I didn't know if you wanted to discuss
23 each of those.

24 MS. KELIUM: Take up the statement first?

25 THE COURT: First, tell me the motions you

1 have got.

2 MS. KELIUM: Copies should be in the court
3 file, but this is an extra copy.

4 THE COURT: Motion in limini.

5 MS. KELIUM: First one is for an order
6 suppressing any mentioning of his pending charges.
7 As I indicated to the court he had a total of five
8 cases simultaneously charged for different dates,
9 all of which were in March of 2002. He has been
10 convicted of one of those charges of burglary. I
11 believe just burglary, or was it burglary and
12 theft?

13 MR. LISEBY: Burglary and theft.

14 MS. KELIUM: That was last November. What
15 the first motion requests is to suppress any
16 mention of any of those other cases because they
17 have nothing to do with this. All it will serve
18 to do is prejudice the jury. It's not proper
19 under 404B case law and argument if the State is
20 planning on bringing that up. At the time we
21 discussed it some of these we may be able to agree
22 on because the State was unclear about what they
23 were going to try to bring in.

24 THE COURT: What's the State's position?

25 MR. LISEBY: We're not going to bring them

1 in in the case in chief. We do reserve the right
2 at the time it may be proper for impeachment
3 purposes or maybe even rebuttal with regard to
4 that. Some of it may depend on the court's ruling
5 in regard to the statement.

6 MS. KELIUM: I don't want to sit through this
7 trial with my hands tied, not be able to cross
8 examine any witness about anything without fear of
9 bringing these in. That's why I wanted a ruling
10 these were not proper 404B.

11 THE COURT: I'm going to grant the motion in
12 limini, but that will be subject to change
13 according to what progresses at trial. Number
14 two, prior convictions.

15 MS. KELIUM: Prior convictions, he has a
16 prior conviction in 1993 for receiving stolen
17 property. And he has a prior conviction,
18 obviously the one we're most concerned about is
19 the prior conviction for burglary and theft
20 arising out of the same series of events he's
21 under trial for now.

22 THE COURT: State's position?

23 MR. LISEBY: Again I think that those would
24 be permissible and admissible for impeachment
25 purposes if the defendant were to testify. We

1 don't intend to get into it in the case in chief
2 unless something happens. We would initially
3 approach the Court.

4 THE COURT: There again it's going to be
5 granted, but subject to what may transpire at
6 trial. Number three?

7 Statement, we'll come back to that. Four.

8 MS. KELIUM: The defendant is accused in this
9 case of attempting to break into Mike and Judith
10 Gragg's home. I expect the evidence would show
11 Mike and Judith Gragg were at home, the maid sees
12 two men outside, both with their face covered,
13 alerts the homeowner. He called 911 or she calls
14 911, one of them does. Two people leave. Shortly
15 thereafter the defendant and co-defendant were
16 stopped in the defendant's vehicle on city
17 property in Hillview Cemetery area. The testimony
18 that would come from that stop was I believe at
19 gun point. He made a felony -- what he termed a
20 felony traffic stop, had the defendant and the
21 co-defendant forced out of the car at gun point,
22 put on their stomachs on the ground where they lay
23 there about 40 minutes while they searched the car
24 and while other officers came on the scene. We
25 don't want any mention of that felony traffic stop

1 and the fact that they had their guns out and made
2 them get on the ground.

3 THE COURT: How long did this happen after
4 the 911 call?

5 MR. LISENBY: Minutes.

6 THE COURT: Minutes?

7 MS. KELIUM: Within minutes. The problems is
8 it's prejudicial and doesn't prove any of the
9 elements the State is required to prove. And it's
10 extremely prejudicial because it gives the jury
11 the impression before they hear the other evidence
12 about the elements that they need to prove is that
13 the defendant and co-defendant weren't violent.

14 THE COURT: How far was it from the house
15 that was the subject of this charge?

16 MS. KELIUM: We'll stipulate that he was
17 stopped near the scene.

18 MR. LISENBY: As the crow flies we can get --

19 MS. KELIUM: Said somewhere around 2 to 300
20 yards.

21 THE COURT: I mean a few miles or 50 miles?

22 MR. LISENBY: I'm going to say much less
23 than a mile and probably less than a quarter of a
24 mile.

25 MS. KELIUM: We will stipulate that he was

1 stopped near the scene. I just think it's a bit
2 extreme for them to be hearing stuff about felony
3 traffic stops, guns drawn, pulled out of the car,
4 put in handcuffs.

5 MS. NEWSOME: 300 to 400 yards.

6 THE COURT: I'll grant as to use of the term
7 felony traffic stop, think about that for a
8 second, but not as to the factual things that
9 happened. What's the State's position on that?

10 MR. LISEBY: I think all of that is
11 admissible as the fact that the officers were
12 responding and this is the way they do this
13 particular thing because they had the nature of
14 call a felony involved.

15 THE COURT: Denied.

16 MS. KELIUM: This motion went a little bit
17 further. At the time we filed Bill was unsure
18 about whether or not they were going to use any of
19 videotapes. There were two videotapes showing the
20 stop and the search of the car. The only part of
21 the stop it shows is the police actually getting
22 out of the car and approaching the vehicle with
23 gun drawn taking my client and the co-defendant
24 out and placing them on the ground and putting
25 them in handcuffs and other police showing up and

1 searching the car. You have 40 minutes of this
2 videotape with my client laying on the ground in
3 handcuffs. And there's several places in the
4 videotape you can tell that they're having words,
5 if you turn the audio on you can tell what those
6 words are. Specifically, a police officer telling
7 my client to, quote, shut the fuck up and,
8 otherwise, being treated very badly. The jury
9 doesn't need to see that. It's not an element.
10 The elements of this case are did he attempt to
11 break and enter into the home of Mike and Judith
12 Gragg with any intent to commit a felony therein.
13 The fact that he's laying on the ground in
14 handcuffs is highly prejudicial. And I've got
15 case law.

16 THE COURT: Motion denied. Put it on the
17 record.

18 MS. KELIUM: The Eleventh Circuit has stated
19 in Gates v Vann. This is 880 F.2nd 293, a 1989
20 case. That it's okay for the jury to see
21 incidental glimpses of the defendant in handcuffs,
22 was not necessarily prejudicial. Clearly the
23 Eleventh Circuit you go beyond that. That's too
24 much. In this case the State would request the
25 jury see and hear 40 minutes of my client laying

1 on his stomach.

2 THE COURT: I don't know that that could very
3 well be used against the State by defense.

4 MS. KELIUM: How is that going to help?

5 THE COURT: The fact you just said the way he
6 was treated.

7 MS. KELIUM: Well, he wasn't treated --
8 basically he's being treated like a criminal. The
9 prejudice the jury is going to get out of it is
10 far more prejudicial than probative. It proves
11 nothing.

12 THE COURT: You're talking about something
13 that actually occurred within minutes of this
14 attempted burglary within a few hundred yards of
15 the house in question. There's going to be
16 testimony --

17 MS. KELIUM: I haven't tried the case where
18 the facts of the arrest have come in before the
19 jury.

20 THE COURT: Then what you want to do is just
21 say that these guys popped up in custody of the
22 police?

23 MS. KELIUM: We'll stipulate that he was
24 arrested.

25 THE COURT: Tell me what kind of stipulation

1 you would enter.

2 MS. KELIUM: We would stipulate that he was
3 within 3 or 400 yards of that home in the car with
4 Bill Norris at the time he was stopped by the
5 police. I don't want the jury to see and hear
6 about 40 minutes of them having him on the ground
7 in handcuffs.

8 THE COURT: There will be I assume testimony
9 of him being on the ground 40 minutes in
10 handcuffs.

11 MS. KELIUM: And what does that prove?

12 THE COURT: It's at the time this happened.
13 I see no need to sanitize the actual occurrences.

14 MS. KELIUM: Forty minutes in handcuffs has
15 nothing to do with an attempt to break in a home.
16 Also it prejudices defendant and making it seem
17 like the police got their guy; and he's guilty,
18 guilty, guilty, or else we wouldn't be hearing
19 about all this.

20 THE COURT: I think it's admissible under the
21 evidence. Motion denied. Next stolen weapons
22 found in the automobile.

23 MS. KELIUM: When we were talking, Bill and
24 I, prior to the trial he was unsure about whether
25 he would try to introduce the fact that one of the

1 guns was stolen I believe from the crime that he
2 was convicted for last November.

3 MR. LISEBY: That's right. Mr. Burton's
4 residence.

5 MS. KELIUM: One of the elements they have to
6 prove is that they had a gun. I don't think a
7 stolen gun does anything but prejudice them more.
8 They're not being charged with that.

9 MS. LISEBY: Let me respond to that in this
10 way, Judge. There's a videotape of the search of
11 the vehicle which the guns are recovered and are
12 shown. Once they were recovered they were
13 returned to the victim, so we don't have the guns
14 physically here.

15 MS. KELIUM: We'll stipulate that there were
16 guns found in that trunk area behind the speaker
17 in the car during that search. I just think it's
18 really prejudicial for them to be seen in
19 videotapes, then they hear about it was stolen and
20 returned. That's why they don't have them. He
21 will enter into a stipulation saying, yes, they
22 were in the car.

23 MR. LISEBY: The only thing is I would like
24 something either from the Court or in a
25 stipulation or something that indicates why the

1 weapons aren't physically present. I don't want
2 the jury to get back there and go, oh, gee, we
3 don't have a gun.

4 MS. KELIUM: We waive that.

5 MR. LISENBY: I understand you waive that.

6 THE COURT: You can tell them that, but it
7 matters to them. The State has got a right to
8 have some explanation of where the gun is if it's
9 not introduced.

10 MR. LISENBY: I don't mind if the Court
11 states that, subject to figuring out how to word
12 it, that there's been a stipulation. We intend to
13 show the videotape where the guns were recovered.
14 The guns were recovered in that area. They have
15 subsequently been returned to the proper owner or
16 something like that. So that they're not --

17 THE COURT: Stipulation that will be fine.

18 MS. KELIUM: I'll work on it during lunch.

19 THE COURT: What actually happened.

20 MS. KELIUM: If that's okay.

21 MR. LISENBY: As I said once we show the
22 videotape and they see that we recovered guns I
23 just don't want the jury go back in the jury room
24 and say where are the guns.

25 MS. KELIUM: There's no audio on the

1 videotape you're going to show?

2 MR. LISENBY: We don't play the audio.

3 THE COURT: If y'all can do the stipulation
4 on number five that will be fine. Number six.

5 MS. KELIUM: How much of this videotape are
6 you going to show? Is it 40 minutes? Are you
7 going to show the whole thing?

8 MR. LISENBY: No.

9 MS. KELIUM: Are you going to cut right to
10 it?

11 MR. LISENBY: What I always do.

12 THE COURT: Number six, criminal history.

13 MS. KELIUM: Only thing on criminal history I
14 know Chris. I have been knowing him for years
15 because I have been assisting him since he was 12,
16 that kind of thing.

17 THE COURT: That's general. That's granted.
18 There's got to be some reason something like that
19 could be admissible.

20 MR. LISENBY: I do want to make a note in
21 that motion in limini she has said that the State
22 has given no notice of its intent to rely on prior
23 bad acts and inadmissible purpose. I just wanted
24 the Court to be aware that there was no request
25 for 404B evidence in that motion. We have

1 discussed because she is obviously aware of a
2 number of the things.

3 THE COURT: That will be noted in number six.
4 Motion in limini number seven. Granted.

5 MS. KELIUM: We've already had one incident
6 before the jury even left the jury room for their
7 first break the officer took my client back in the
8 back. The jury wasn't out of the room. Half of
9 them were in here chatting with each other on the
10 way out at the door. We're doing what we can. I
11 understand there's some logistical problems. But
12 they can at least wait until the jury is gone.

13 THE COURT: That's the kind of thing that can
14 actually be overplayed. I have been here the
15 whole time. There's not been any action --

16 MS. KELIUM: You were already in your office.

17 THE COURT: That I have seen. It's a dual
18 thing. He is incarcerated. That officer is under
19 a duty to see that he remains incarcerated. But
20 at the same time we want to take whatever is
21 necessary to keep that from being conveyed to the
22 jury. So that's granted.

23 All right. Statement number three, that's
24 going to be in the nature of a motion to suppress.
25 Does the State need to call a witness?

1 MR. LISEBY: Of course, for the record
2 we're just going to object for the lateness of the
3 filing for that motion to suppress.

4 THE COURT: Noted.

5 MR. LISEBY: Let me just note for the
6 record, Your Honor, let me note for the record
7 that I intend to sanitize this with the use of
8 your word with regard to presentation before the
9 jury. Just so the Court will understand the
10 circumstances I'm going to go through the process
11 of what occurred here.

12 MOTION TO SUPPRESS

13 JEFF BLACKSTONE

14 called as a witness by the State, having been
15 first duly sworn, was examined and testified as
16 follows:

17 DIRECT EXAMINATION

18 BY MR. LISEBY:

19 Q Tell us your name, please.

20 A Jeff Blackstone.

21 Q Where are you employed?

22 A Chambers County sheriff's office.

23 Q What is your current position there?

24 A Chief investigator.

25 Q How long have you been with the sheriff's

1 department?

2 A Approximately 10 years.

3 Q How long have you been involved in investigations?

4 A Approximately five years.

5 Q Investigator Blackstone, I want to direct your
6 attention back to March the 19th of 2002 in
7 connection with events involving Chris McCullough.
8 Did you have an occasion to see Mr. McCullough
9 that day?

10 A Yes, I did.

11 Q Where did you see him at?

12 A Lanett PD.

13 Q For what purpose did you see Mr. McCullough?

14 A Case I was working in Lafayette was a burglary.

15 Q So you were actually there to interview Mr.
16 McCullough yourself?

17 A Yes, I was.

18 Q Were there other officers also there?

19 A Yes, there was.

20 Q Just in general can you tell us what agencies were
21 involved?

22 A It was Lafayette PD, Lanett PD, Chambers County
23 sheriff's department.

24 Q Prior to your speaking with Mr. McCullough did you
25 advise him of some constitutional rights?

1 A Yes, I did.

2 Q How did you do that?

3 A We have a waiver of rights that I have written,
4 constitutional rights.

5 Q When you did that, did you also fill in some
6 blanks that were on that form?

7 A Yes, I did.

8 Q Can you tell us about that?

9 A I took the waiver, and I read it to Mr. McCullough
10 and filled in place Lanett PD, date 3/19/02, time
11 14:47.

12 Q Is that central time or eastern time?

13 A I usually do everything on central time. That
14 should be central time.

15 Q That's because of what?

16 A I work on central time.

17 (State's Exhibit 1, rights form, marked
18 for identification.)

19 Q Show you what is marked as State's Exhibit Number
20 1. Take a moment and see if your recognize that.

21 A Yes, I do.

22 Q What is that?

23 A A copy of the rights form I read to Chris
24 McCullough.

25 Q Is that an accurate copy of your original that you

1 have in your file?

2 A Yes, it is.

3 MR. LISENBY: Ms. Kelium, you can see the
4 original if you'd like to.

5 Q If you would, would you tell the court what you
6 advised Mr. McCullough of?

7 A I advised Mr. McCullough I said before I ask you
8 any questions I'm I going to read you your rights.
9 Advised him you have got the right to remain
10 silent. Anything you say can and will be used
11 against you in a court of law. You have a right
12 to a lawyer and to have him present with you when
13 you're being questioned. If you cannot afford to
14 hire a lawyer one will be appointed to represent
15 you before any questions if you wish if you decide
16 at any time to exercise these rights not to answer
17 any questions.

18 Also went further and then read him his
19 waiver of rights. I have read this statement of
20 my rights or have been read to me. I understand
21 my rights. I want to waive these rights and make
22 a statement. No promises or threats have been
23 made to me and no coercion of any kind was used
24 against me.

25 I had Mr. McCullough go back and initial

1 everything after I read it to him.

2 Q Tell me what you mean by that.

3 A We have one through five on the rights form that
4 he read it hisself. And as he read it I had him
5 to put his initial beside where he read.

6 Q So he acknowledged some way he had read and
7 understood that right?

8 A Yes, he did.

9 Q Is there a form on there for a signature?

10 A Yes, it is.

11 Q Tell me about that.

12 A At the bottom after he was through I had him sign
13 the rights form which he agreed to give a
14 statement, and he signed Chris McCullough.

15 Q And that was in your presence?

16 A That was in my presence.

17 Q Were there other officers also present at that
18 time?

19 A Yes, there was.

20 Q Who would that be?

21 A Kenny Vines, Steve Smith, Mike Looser, also
22 Lincoln Whaley was in there at the time.

23 Q Tell me what agencies those officers belong to.

24 A Kenny Vines and Steve Smith are Lafayette PD.

25 Mike Looser and myself are Chambers County

1 sheriff's department. And Lincoln Whaley is
2 Lanett PD. He was an investigator at the time.

3 Q After you advised Mr. McCullough of his rights and
4 before anyone spoke to him did you or anyone in
5 your presence threaten him?

6 A No, sir.

7 Q Did you or anyone in your presence promise him
8 anything or offer him any hope of reward?

9 A No, sir.

10 Q Did you or anyone in your presence tell him it
11 would be better for him to make a statement than
12 to not to make a statement?

13 A No, sir.

14 MR. LISENBY: We would offer State's Exhibit
15 Number 1 for the purpose of this hearing.

16 THE COURT: Admitted.

17 (State's Exhibit 1 admitted.)

18 Q Investigator Blackstone, in connection with the
19 burglary at Mike Gragg's residence, did you have
20 any conversation with Mr. McCullough?

21 A Not in reference to that burglary.

22 MR. LISENBY: Ms. Kelium may have some
23 questions.

24 CROSS EXAMINATION

25 BY MS. KELIUM:

1 Q Were you in the room when there were conversations
2 going on about that burglary?

3 A I wasn't there about that. I don't remember
4 whether there was anything going about that one or
5 not.

6 Q Refer to you what the State has just admitted to
7 this hearing as Exhibit 1. What's the time on
8 that form?

9 A 2:47 central.

10 Q Is that what time he signed that form?

11 A Yes.

12 Q Did you remain in the room for the entire
13 statement after this?

14 A No. I only took my statement. Kenny Vines and
15 Steve Smith took their statement. I had already
16 left.

17 Q So you don't know what went on as far as this
18 statement for this case?

19 A No.

20 Q Don't know what was told to him? You don't know
21 if there were any promises made to him after he
22 signed this form? Don't know of any of the
23 conversation that went on?

24 A No.

25 Q Were you involved in questioning Mr. Norris?

1 A I questioned Mr. Norris.

2 Q I'm going to show you what I'm going to mark as
3 Defendant's Exhibit 1 for purpose of this hearing.
4 Can you take a look at that. Do you recognize
5 that document?

6 A Yes, I do.

7 Q What is it?

8 A It's a rights form that Richard Carter read and
9 Billy Norris and I witnessed.

10 Q So that is your signature at the bottom?

11 A Yes, it is.

12 Q What time is that rights form signed?

13 A He's got 11:55.

14 Q So that's somewhere close to three hours before
15 you had Mr. McCullough read his rights form?

16 A Approximately.

17 MS. KELIUM: Admit this for purpose of this
18 hearing.

19 THE COURT: Admitted.

20 (Defendant's Exhibit 1 admitted.)

21 Q Were you in the room with Billy Norris the entire
22 time he was being questioned before he went in
23 with Mr. McCullough?

24 A I really can't remember. I really can't remember.

25 Q You can't remember?

1 A If it was Richard that questioned Billy.

2 Q Do you remember whether Mr. McCullough was being
3 questioned at the same time as Mr. Norris?

4 A No, he wasn't.

5 Q Who else was in the room with Billy Norris?

6 A I don't remember.

7 Q You do see on State's Exhibit 1 where it has who
8 was present?

9 A I wrote that.

10 Q You wrote this. Do you know if any of these
11 gentleman were in on Billy Norris?

12 A I don't remember.

13 Q Was it more than just you and Lieutenant Carter?

14 A When Lieutenant Carter read him his rights I
15 remember I was in there then and signed as a
16 witness. Other than that I don't remember
17 anything on Billy Norris.

18 Q In fact, this happened -- the date on both of
19 those forms is March 19th. It's been a year and a
20 half, right?

21 A Right.

22 Q You've been involved in lots of other cases?

23 A That's right.

24 Q Fair to say you don't have a whole lot of memory
25 of the events that went on in this except for

1 what's written down?

2 A Except what's written down and what's in my cases.

3 (Defendant's Exhibit 2, statement,
4 marked for identification.)

5 Q Let me show you what's marked as Defendant's
6 Exhibit Number 2. Do you recognize that document?

7 A It's a Lanett Police Department statement.

8 Q Does anything in that statement contain
9 information that you elicited from Billy Norris?

10 A I don't see anything.

11 Q Do you know the time that's on this statement?

12 A 14:40.

13 Q That is?

14 A Eastern standard time.

15 Q What time?

16 A 2:40.

17 Q Eastern standard time. You would agree that that
18 time is about seven minutes before Mr. McCullough
19 signed this one?

20 A Central time, hour and seven minutes between those
21 two.

22 Q One of these is an eastern?

23 A One on central.

24 Q How do you know which one is eastern?

25 A We do everything on central time. Lanett does it

1 on eastern time?

2 THE COURT: East is east, west is west.

3 MS. KELIUM: I know. I don't have any other
4 questions.

5 REDIRECT EXAMINATION

6 BY MR. LISENBY:

7 Q Just so the record can be clear, Investigator, can
8 you explain what the central and eastern time
9 situation is in Chambers County, Alabama?

10 A The time zone splits our county. Half our county
11 works off central time which is an hour behind
12 eastern time. That part of the county Lanett and
13 Valley all of that is eastern time. And all this
14 part of the county is central time.

15 Q Your main office is where?

16 A Central time.

17 Q Here in the City of Lafayette?

18 A It is confusing.

19 MR. LISENBY: That's all I have.

20 THE COURT: Anything else? Call your next
21 witness.

22 RICHARD CARTER

23 called as a witness by the State, having been
24 first duly sworn, was examined and testified as
25 follows:

DIRECT EXAMINATION

BY MR. LISEBY:

Q Tell us your name, please, sir.

A Richard Carter.

Q Where are you employed?

A Lanett Police Department.

Q What is your present position with the Lanett Police Department?

A Lieutenant in charge of investigations.

Q How long have you been employed by the Lanett Police Department?

A Twelve years and about four months.

Q How long have you been involved in investigations?

A Seven years and again four months.

Q Let me direct your attention back to March the 19th of 2002 and in regard to an alleged break-in or attempted break-in at Mike Gragg's residence. Were you involved in that?

A Yes, I was.

Q Briefly for the purpose of this hearing, what was your initial involvement?

A Called to assist Lieutenant Bettis at the scene. He conducted the traffic stop. And then from that point assisted Lieutenant Whaley on the investigation and subsequent interviews of the

1 suspect.

2 Q During the course of this investigation did you
3 have occasion to see the defendant in this case
4 Chris McCullough?

5 A Yes, I did.

6 Q Where did you see him initially?

7 A In the Hillcrest Cemetery.

8 Q That would be the place of the traffic stop?

9 A Yes.

10 Q Later on did you see him at the Lanett Police
11 Department?

12 A Yes, sir.

13 Q Did you have the occasion to speak to him at the
14 Lanett Police Department?

15 A Yes.

16 Q When you spoke to him were you alone, or were
17 other officers present?

18 A Lieutenant Whaley was present. At the time he was
19 Detective Whaley.

20 Q He's changed jobs since then; is that right?

21 A Yes.

22 Q When you spoke to Mr. McCullough did you or anyone
23 in your presence threaten him?

24 A No.

25 Q Did you or anyone in your presence promise him

1 any thing or offer him any hope of reward?

2 A No.

3 Q Did you or anyone in your presence tell him it
4 would be better for him to make a statement than
5 to not to make a statement?

6 A No.

7 Q Did he then make a statement to you concerning
8 Mike Gragg's residence?

9 A Yes, he did.

10 (State's Exhibit 2, statement, marked
11 for identification.)

12 Q I'm about to show you a document that I have
13 marked as State's Exhibit Number 2. Take a look
14 at that for a moment and see if you recognize the
15 contents of that particular document?

16 A Yes, I do.

17 Q Now, State's Exhibit Number 2, kind of speed it
18 along, State's Exhibit Number 2 is a statement in
19 reference to Mike Gragg's burglary; is that
20 correct?

21 A Yes, sir.

22 Q You spoke to Mr. McCullough. Did you take
23 information with regard to another burglary also?

24 A Yes, I did.

25 Q That is not contained on what is now marked

1 Stat^s Exhibit Number 2; is ^tat correct?

2 A That's correct.

3 Q Other than that information about these other
4 burglaries that would not be involved in this
5 case, does this State's Exhibit Number 2 conform
6 to your original with regard to Mike Gragg's
7 burglary?

8 A Yes, it does.

9 Q If you would tell us -- there's some blanks on
10 there that I believe were filled in -- tell us
11 about this statement. See what I'm talking about,
12 date, time, place, statement of, address and phone
13 number.

14 A Statement of Chris McCullough, address he give us
15 there, phone number he give us, the date March
16 19th, '02. The time of the statement began 16:53
17 military time. Shows one page, first page of one
18 page.

19 Q 16:53 is that central or eastern time?

20 A Eastern time.

21 Q Because you work for the City of Lanett?

22 A Yes.

23 Q If you would go ahead and read that statement for
24 us, please.

25 A Today I picked him up at my house. I had been to

1 Lafayette at the Food Stamp Office. I was headed
2 back to Lafayette when we saw the house. We
3 stopped and parked down at the cemetery. When we
4 got out I had a mask and a 9 mm. Billy had a
5 bandanna and gloves. He left the duck tape in the
6 car. We went through the woods to the house.
7 When we got to the house Billy saw a lady inside
8 folding clothes. He told me. And I said let's
9 go. He said you got a gun. You might as well go
10 on and do it. I told him no. Then we was walking
11 back towards the woods when we heard the police
12 car coming up. Then we ran through the woods to
13 the car.

14 Mr. McCullough read this statement, advised
15 that it was true and correct and would not sign
16 it. Then I signed it.

17 Q Again State's Exhibit Number 2 with regard to Mike
18 Gragg's burglary is a copy of your original; is
19 that correct?

20 A That's correct.

21 MR. LISENBY: We would offer Number 2.

22 THE COURT: Admitted.

23 (State's Exhibit 2, statement,
24 admitted.)

25 MR. LISENBY: Ms. Kelium may have some

1 questions for you.

2 CROSS EXAMINATION

3 BY MS. KELIUM:

4 Q Could you take a look at State's Exhibit 2 for
5 me. On the top line of the statement who is him?

6 A Billy Ralph Norris.

7 Q Is that who he's referring to as him?

8 A Yes, ma'am.

9 Q Is it typical when you're writing out statements
10 like that to leave -- I apologize it's been a long
11 time since I studied grammar -- to leave a
12 preposition of that nature without further
13 identifying?

14 A I agree. I probably should have written the
15 subject's name in parenthesis.

16 Q You knew that the eastern time here is almost 5:00
17 eastern time?

18 A Yes, ma'am.

19 Q Let me show you what's been marked as State's
20 Exhibit 1. Does that also have eastern time noted
21 on it?

22 A It's got military time, and I would assume since
23 the sheriff's department investigator filled this
24 out that they work on central time.

25 Q So that time is actually 2:47 central time; is

1 that right?

2 A Yes, ma'am.

3 Q So it was at least an hour and probably a little
4 more between this time and the time that Exhibit 2
5 was taken down?

6 A Yes, ma'am.

7 Q What was going on in that hour?

8 A The initial interview question/answer session. We
9 didn't initially jump in and start writing a
10 written statement.

11 Q But you don't have any written record of what went
12 on during this question and answer session or this
13 initial interview?

14 A That's correct. I do not.

15 Q Is it fair to say that you had already
16 participated in the questioning of Billy Norris?

17 A Yes, ma'am.

18 Q Is it fair to say with regard to this statement
19 since he's prominently mentioned as him in the
20 first few words that the majority of what you and
21 Chris McCullough talked about was what Billy
22 Norris said?

23 A I wouldn't say the majority of it. I would say
24 some of it, yes.

25 Q But you told Mr. McCullough this is what Billy

1 Norris said happened?

2 A At times I'm sure I would.

3 Q Are you familiar with Defendant's Exhibit 2? I'll
4 show you.

5 A Yes, ma'am.

6 Q And did you participate in that statement?

7 A Yes, I did.

8 Q Would you agree that there are a lot of portions
9 of Billy Norris' statement and Chris McCullough's
10 statement that are corresponding. And take your
11 time to review.

12 A If you'd reask the question.

13 Q My question was would you agree that there are
14 several things in there where the statements
15 correspond to each other?

16 A Yes, ma'am.

17 Q You have already stated, of course, the time shows
18 Billy Norris' statement taken first?

19 A That's correct.

20 Q Chris McCullough was not being questioned during
21 the time Billy Norris was being questioned about
22 this event?

23 A About this event, correct.

24 Q I'm going to refer to State's Exhibit 2 again.

25 Could you read what is next to the star asterisk

1 on the last two lines of the statement, please?

2 A Mr. McCullough read the statement and advised that
3 it was true and correct and would not sign it.

4 Q If he advised it was true and correct, why
5 wouldn't he sign?

6 A He just refused to sign it.

7 Q Did he say I advise that that is true and correct?

8 A No. I said is the statement correct? Is this
9 what you told me? He said it was.

10 Q What did he say?

11 A He said yes.

12 Q He said yes, but I'm not going to sign it?

13 A Yes.

14 Q Have you had -- referring to State's Exhibit 1
15 again -- have you had suspects who reviewed this
16 waiver of rights form, signed it, and then didn't
17 give you a statement?

18 A Yes, ma'am.

19 Q So just because they sign the waiver of rights
20 contained in State's Exhibit 1 doesn't mean they
21 actually will go ahead and give you a statement
22 afterwards; is that right?

23 A That's correct.

24 Q So this doesn't necessarily give any evidence of
25 someone giving a voluntary statement?

1 A It just tells us and the courts that they agreed
2 to answer questions that we asked.

3 Q There's sometimes people sign this and don't
4 answer any questions that you ask them, right?

5 A Sure.

6 MS. KELIUM: I don't have any other
7 questions. I just move to admit for the purposes
8 this hearing Defendant's Exhibit 1 and 2.

9 THE COURT: Admitted.

10 (Defendant's Exhibit 2 admitted.)

11 REDIRECT EXAMINATION

12 BY MR. LISENBY:

13 Q I want to show you what I have now marked as
14 State's Exhibit Number 3, Lieutenant Carter, and
15 take a moment and see if you recognize what that
16 is.

17 A Yes.

18 Q What is that?

19 A This is the complete statement that I took from
20 Mr. McCullough on that day.

21 Q And when you say the complete statement, this
22 refers to the other burglary that you were
23 questioning him about; is that correct?

24 A Yes.

25 Q Ms. Kelium was asking you questions about the

1 first line of the Gragg statement that said the
2 day I picked him up at my house, and there wasn't
3 a reference to who him was; is that correct?

4 A Yes, sir.

5 Q What about the first paragraph?

6 A He's named in the paragraph by his first name.

7 MR. LISEBY: For purposes of this hearing,
8 Your Honor, I would offer State's Exhibit Number
9 3. And the reason for that is that if, in fact,
10 Ms. Kelium asks a question as she did in front of
11 the jury about who is him, I would like to be able
12 to get into the entire statement that way.

13 THE COURT: Admitted.

14 (State's Exhibit 3, statement,
15 admitted.)

16 MR. LISEBY: That's all with regard to the
17 statement.

18 THE COURT: Anything from the defense? You
19 may step down.

20 MS. KELIUM: Your Honor, just Lieutenant
21 Carter acknowledges that even though he signed a
22 waiver of rights form that's no evidence that the
23 statement was voluntary. It obviously wasn't
24 voluntary because after he reviewed it he refused
25 to sign it. Now the State would use that against

1 him in court and say, well, he said all this. He
2 said all this voluntary, this is knowing.
3 Obviously it wasn't knowing and voluntary because
4 once he reviewed the statement he said, no, I'm
5 not signing that.

6 THE COURT: Motion to suppress denied. I
7 will give the proper jury charge on defendant's
8 statement that covers all of the type of objection
9 that you raise. And it's up to the jury to
10 determine what weight to give the statement. I
11 find that it is voluntarily, knowingly, and
12 intelligently made as far as the statement. But
13 I'll give the correct jury charge as to weight
14 that they can attach to the evidence. Are we
15 ready?

16 (JURY PRESENT)

17 THE COURT: Ladies and gentlemen, let me tell
18 you the procedure that we'll be following
19 throughout the course of this trial. How many of
20 you have served on the jury in the past two
21 weeks? Okay. Thank you.

22 As I have said before you'll have to listen
23 to this again. The first order of business will
24 be that the attorneys for both State and defense
25 present to you their opening statements. Now,

1 what the attorneys say is not evidence. However,
2 they can tell you what they expect the evidence to
3 be. They can tell you what they expect to be
4 proven or what they expect not to be proven in the
5 case. They can in short use their opening
6 statements as sort of a road map to tell you where
7 this case is going.

8 I'll remind you again that what the attorneys
9 say is not evidence. And the evidence will come
10 to you in the form of sworn testimony from this
11 witness stand and from any items or exhibits that
12 I admit as evidence for your consideration.

13 After opening statements the State will be
14 given an opportunity to present their case to you.
15 Then defense will be given an opportunity to
16 present their case to you. After all evidence has
17 been presented, the attorneys will again address
18 you in what's called closing arguments. At that
19 time counsel for both State and defense can tell
20 you what they think the evidence has shown. They
21 can tell you what they think has been proven or
22 not proven. They can ask for you to draw
23 reasonable inferences from the testimony and
24 evidence presented. Again what they say is not
25 testimony. You will be the ultimate judges of the

1 facts of this case. I will be the judge of the
2 law. And after closing arguments of counsel I
3 will charge you on the law that applies to this
4 case. You cannot substitute that with what you
5 think the law is or what you think the law ought
6 to be.

7 After I have charged you on the law I will
8 send you back to the jury room to deliberate and
9 reach your verdict. You will choose a foreperson
10 to act on your behalf and to moderate your
11 deliberations. You may choose your foreperson by
12 whatever method you think is correct and proper.
13 Your foreperson will be the one that actually has
14 to sign the verdict form. I will prepare verdict
15 forms for you. But your foreperson must sign the
16 verdict form that actually conforms with your
17 actual vote.

18 Your vote and your verdict must be unanimous.
19 That is, all twelve jurors must concur in whatever
20 verdict you reach. Anything requested further by
21 State at this time?

22 MR. LISEBY: Not at this time, Your Honor.

23 THE COURT: By defense?

24 MS. KELIUM: Not at this time.

25 THE COURT: You may state your case to the

1 jury.

2 (MR. LISEBY AND MS. KELIUM MADE OPENING
3 STATEMENTS WITH NO OBJECTION)

4 THE COURT: Call your first witness.

5 MS. NEWSOME: State calls Ola Pearl Trammell.

6 OLA PEARL TRAMMELL

7 called as a witness by the State, having been
8 first duly sworn, was examined and testified as
9 follows:

10 DIRECT EXAMINATION

11 BY MS. NEWSOME:

12 Q Ms. Trammell, please state your full name.

13 A Ola Pearl Trammell.

14 Q Where do you live, Ms. Trammell?

15 A I live at 950 Whitten Road in West Point, Georgia
16 in Harris County.

17 Q How are you currently employed?

18 A Well, I'm not employed right now. Of course, I
19 was working, but my husband is debilitated. So I
20 had to quit. And the people I iron for, they
21 still bring their clothes and pick them up and I
22 still iron for them.

23 Q Was there some time when you worked for Mike and
24 Judith Gragg?

25 A Yes, and I still do.

1 Q During your employment did you ever go to their
2 residence to perform your work there?

3 A Yes, I did.

4 Q I'd like to direct your attention to March the
5 19th of last year. Do you recall that particular
6 day?

7 A Yes, I do.

8 Q Were you at the Gragg residence on that day?

9 A Yes, I was.

10 Q Do you recall what you were doing that morning?

11 A I was ironing.

12 Q While you were ironing did you notice anything
13 unusual outside?

14 A Yes. I happened to glance out the window. And I
15 saw a man with a ski mask running around the house
16 toward the front of the house. And I got up close
17 and looked out. And I saw another man crouching
18 down with a blue bandanna on his face.

19 Q Could you tell if these individuals were white or
20 black?

21 A They were black. I could see. Their faces were
22 covered, but their arms weren't.

23 Q Did they both appear to be black males?

24 A Yes.

25 Q Ms. Trammell, do you remember what color the ski

1 mask was?

2 A Yes, it was a dark blue or black.

3 Q Do you recall what color the bandanna was?

4 A Yes, it was blue and white.

5 Q And did you say that bandanna was covering one
6 individual's face?

7 A Yes. He had it around his face this way.

8 Q So it covered just the lower part of his face
9 below his nose?

10 A Yes.

11 Q What did you do after you saw these two people?

12 A Mr. Gragg had just stepped out the door to smoke a
13 cigarette. And I called him in. I said, Mr.
14 Gragg, come on back in. I just saw two men with
15 masks on their face go around the house.

16 Q Were you concerned about what you had just seen?

17 A Of course I was.

18 Q Were you concerned for Mr. Gragg's safety?

19 A Yes.

20 Q Is that why you called him back into the
21 residence?

22 A Yes, also because if they got him out there they
23 could have forced him inside and hurt all of us.

24 Q What did Mr. Gragg do after you conveyed this
25 information to him?

1 A He came back inside. And he got his gun out of
2 the closet. And he told me, Miss Pearl, go on
3 down there where Judy is, his wife. Then he got
4 on the telephone, and he called the police.

5 Q Did you hear what he said on the telephone?

6 A No, because I was gone down there to where Ms.
7 Gragg was. She was upstairs, and she came down.
8 She heard us talking. And then we went on down to
9 her bedroom. And we could see out the window.
10 And we looked to see if we saw those men. We know
11 they went around the front. She said, look, Miss
12 Pearl, there they go. They're going down toward
13 the barn.

14 Q You were able to see this from the upstairs
15 bedroom?

16 A Not upstairs. She had come downstairs. And we
17 could see it from her bedroom from the window of
18 her bedroom.

19 Q You were able to locate Ms. Gragg and you went to
20 the downstairs bedroom with her?

21 A Yes.

22 Q Tell me again. What did you see from the bedroom
23 window?

24 A We saw these two men running down passed the barn
25 which it goes toward a cemetery out there. And

1 they were running toward that cemetery passed the
2 barn.

3 Q Do you remember if they were still wearing the
4 clothing items you had seen on them earlier?

5 A Yes. They had on what they had on the first time
6 I saw them.

7 Q You told me you had noticed a ski mask and
8 bandanna. Did you notice anything else about
9 their clothes, their shirts, or pants?

10 A Not anything particular.

11 Q Did you notice when the police arrived?

12 A Yes, it wasn't very long. They were there within
13 a very short time.

14 Q Were you able to see any of the police officers at
15 the residence while you were in the bedroom?

16 A Yes. I saw some of them go over toward the
17 cemetery.

18 Q Were they headed in the same direction you had
19 seen the two blacks males run?

20 A Yes, yes.

21 MS. NEWSOME: Thank you, Ms. Trammell.

22 That's all the questions I have.

23 (The following occurred at the bench
24 outside the hearing of the jury.)

25 MS. KELIUM: May I approach, Your Honor? I

1 begged and begged before trial to get witness
2 statements, and I was denied. I told them it's
3 going to take us forever to get through. But I
4 want to review this statement before cross
5 examination. My client has that right.

6 MR. LISEBY: My understanding the Court has
7 the ability to review the statements in camera to
8 determine if there's anything that would be
9 exculpatory.

10 THE COURT: Let me see the statement. Really
11 nothing exculpatory at all.

12 MS. KELIUM: Okay.

13 THE COURT: Cross examination.

14 CROSS EXAMINATION

15 BY MS. KELIUM:

16 Q Ms. Trammell, I'm Kyla Kelium. And I represent
17 Chris McCullough in this case. I just have a few
18 questions for you, okay. You said that you were
19 still in the bedroom, Ms. Gragg's bedroom, when
20 you saw the police go by; is that right?

21 A Yes. Yes, I did say that.

22 Q How long were you in that bedroom? Were you there
23 very long?

24 A We weren't there very long, maybe about 10/15
25 minutes.

1 Q So you think it was 10/15 minutes before you saw
2 the police go back?

3 A No. We were in the bedroom 10 or 15 minutes. I
4 said the police were there very soon after Mr.
5 Gragg called.

6 Q You think they were there in much less than 10
7 minutes?

8 A Yes, of course.

9 Q You said that you could tell that these gentlemen
10 were black from their arms; is that right?

11 A I'm black. I know black when I see black, yes.

12 Q So is it fair to say that they were wearing
13 clothes, and you could see their skin?

14 A Yes, yes.

15 Q Did you see either of these gentlemen with a gun?

16 A No, I didn't see a gun.

17 Q You didn't see a gun on either one of them, did
18 you?

19 A No.

20 Q They weren't wearing big bulky jackets or anything
21 like that?

22 A No. I didn't see a gun. I don't know whether
23 they had them or not. But I didn't see one.

24 MS. KELIUM: That's all the questions I have.

25 Thank you.

1 THE COURT: Anything else. Thank you, ma'am.

2 You're free to go. Call your next witness.

3 MS. NEWSOME: State calls Judith Gragg.

4 JUDITH BRANDON GRAGG

5 called as a witness by the State, having been
6 first duly sworn, was examined and testified as
7 follows:

8 DIRECT EXAMINATION

9 BY MS. NEWSOME:

10 Q Ms. Gragg, please state your full name.

11 A Judith Brandon Gragg.

12 Q Where do you reside?

13 A 3622 Country Club Road.

14 Q How long have you lived at that residence?

15 A About eight years, almost eight years.

16 Q I'd like to direct your attention to the day of
17 March the 19th of 2002 and ask do you recall that
18 particular day?

19 A Oh, yes, ma'am.

20 Q Do you recall what you were doing that morning?

21 A I do.

22 Q If you would please tell us what you were doing on
23 the morning of March the 19th, 2002.

24 A We were preparing to leave for a trip. The
25 following day Miss Ola Pearl had come that morning

1 to iron. And we had two young men to come to do
2 yard work. We were waiting for them to come to
3 give them instructions. Once we did that our day
4 would really get started. I had gone upstairs to
5 put some things in the closet and took some things
6 out and put some things back. I was up there a
7 few minutes. I heard a lot of noise downstairs.
8 I could tell my husband Mike and Miss Ola Pearl
9 were talking. So I kind of listened because it
10 wasn't like they were just talking loud or joking
11 or anything like that. I could tell something was
12 wrong.

13 Q Were you able to understand any of that
14 conversation?

15 A At first I wasn't. And then I heard Mike tell
16 Miss Pearl, find Judy. So I stopped what I was
17 doing and listened for a second trying to, you
18 know, decide what was going on. I could tell
19 something was wrong. I heard Mike say, Miss
20 Pearl, find Judy again. And then he said, Miss
21 Pearl said I think she's upstairs. He said, find
22 her and y'all get away from the windows.

23 Q You said you could tell that something was wrong.
24 What made you think that something was wrong?

25 A The fact that they were speaking loudly and just

1 tone of voice.

2 Q What happened next?

3 A Mike told Miss Pearl -- I heard him say, find
4 Judy. Miss Pearl started up the steps. At that
5 time I had come out of the bedroom onto the
6 balcony. And I met Miss Pearl. I was on the
7 balcony. She was probably two steps from the top.
8 I said, Miss Pearl, what's wrong. And she said,
9 there are two men outside with masks and bandannas
10 I think is what her word -- anyway I got the
11 impression they were not the kind of people that
12 you expect to see outside. So she said Mr. Gragg
13 said for us to come downstairs and get away from
14 the windows. So we turned around and went down
15 the stairs. I met Mike at the bottom of the
16 stairs. And he said y'all get away from the
17 windows. We don't know how many people are out.

18 MS. KELIUM: Your Honor, I'm going to object,
19 have a continuing objection to whatever they said.

20 THE WITNESS: I'm sorry.

21 THE COURT: Overruled.

22 A We went down the hallway to my bedroom that's at
23 the end of the hall. That room was closed off
24 because I just hadn't cleaned up back there that
25 morning after we had gotten up.

1 Q Were you and Ms. Trammell the only two individuals
2 that went to the bedroom?

3 A Yes, ma'am.

4 Q Where was your husband?

5 A He was in the foyer area, our house we have a
6 foyer and there's a hallway. Then it opens up.
7 It's all real open. It opens up into our den. He
8 was standing right there kind of at the end of the
9 foyer and the hallway where he could see the front
10 door and the door that comes, two doors that come
11 in from the back of our house.

12 Q Did you see him pick up the telephone or make a
13 telephone call?

14 A No, I did not see that. I think he had done that
15 before I got down there.

16 Q What did you and Miss Pearl do after you got into
17 the bedroom?

18 A We went in the bedroom. We were both real scared,
19 of course. I tried to get Miss Pearl to sit down.
20 And I walked around -- the end of our house we
21 have two windows. And they just happened to be
22 one on either side of the bed. So I walked around
23 to the window on the left which is on the back
24 corner of my house. I don't know. I just looked
25 out. When I did I saw three -- I believe it was

1 three policemen out there, two were in uniform and
2 one I believe just had a sports shirt on. And, I
3 said, Miss Pearl, the police are already here. So
4 she came to look out. I think I made mention then
5 that I saw at least two of the policemen had guns
6 drawn I believe at that point. She came to look
7 out that window. I walked around the bed to the
8 other window and looked out the window. When I
9 did I saw this person running.

10 Q Saw one person running?

11 A I saw one person running down toward our barn
12 right at the edge of the woods. It's real grown
13 up. So it's almost like a wall of woods, like a
14 line of woods. That's where I saw this person.
15 They were running like along the edge of that
16 wooded area.

17 Q Do you remember what that person was wearing?

18 A A white T-shirt and dark pants. I believe it was
19 jeans the best I could see. But I'm sure of the
20 white shirt and dark pants.

21 Q When you saw this person did he have anything on
22 his head or face?

23 A I didn't -- I couldn't see that or I didn't notice
24 that from where I was.

25 Q Did you convey any of this information to your

1 husband?

2 A I started screaming. I was saying, Miss Pearl,
3 tell Mike they're going the wrong way because when
4 I looked out the window I could see the three
5 policemen. Just as I got over to the other window
6 and I saw the person running down the hill, they
7 had -- all three were not at the same time or they
8 weren't rushing, but they were moving back toward
9 the front of my house just in that direction, not
10 rushing or anything. But they were moving in the
11 direction. And I was trying to get Mike's
12 attention that they were going the wrong way, that
13 I could see someone down by the barn.

14 Q Did it appear to you that the police were
15 moving around toward the front of the house and
16 away from the person that was running?

17 A Right. They were going this way. And the person
18 that was running was like directly in front of me
19 down by the barn.

20 Q Were you able to tell your husband about that?

21 A Well, Miss Pearl stepped out into the hallway to
22 tell him. I was yelling, but I don't think he
23 heard us say that. I think he heard us say that
24 the police were there. But I don't know that he
25 heard us say -- I think he heard us say that the

1 person was down by the barn. I don't think he
2 knew at that point that the police were there. He
3 didn't know the police were there. He did hear us
4 say that there was a person down by the barn.

5 Q Anything happen after you saw that person running
6 down by the tree line?

7 A Well, I had stepped away from the window screaming
8 to Mike, trying to make him hear. So by the time
9 I got back over to the window I didn't see anyone.

10 Q That person was gone when you got back to the
11 window?

12 A Then I went back out into the hallway. Then I
13 never looked out again.

14 MS. NEWSOME: Thank you, Ms. Gragg. That's
15 all the questions I have. Ms. Kelium may have
16 some.

17 MS. KELIUM: May I approach, Your Honor?

18 THE COURT: Yes.

19 (The following occurred at the bench
20 outside the hearing of the jury.)

21 MS. KELIUM: I don't want to beat a dead
22 horse, but I did ask way ahead of time.

23 MR. LISEBY: They're not discoverable.
24 That's why we didn't give them.

25 MS. KELIUM: After this witness I want to

1 invoke the rule. I neglected to do that earlier.

2 MR. LISEBY: I would have given this to you
3 if they had anything exculpatory. Do you want us
4 to ask the officer to leave now?

5 MS. KELIUM: No.

6 THE COURT: All right. Go ahead. Cross
7 examination.

8 (Jury Present)

9 CROSS EXAMINATION

10 BY MS. KELIUM:

11 Q Ms. Gragg, I just have a couple of questions for
12 you. You stated that the only person you saw was
13 one person in the white pants -- I'm sorry,
14 T-shirt and jeans?

15 A Uh-huh.

16 Q You would agree with me that the police were there
17 very quickly?

18 A Extremely quickly.

19 Q You went to look, there's a guy running over here,
20 there's the police over here? Is that about
21 right?

22 A Yes, ma'am. They were right outside our bedroom
23 on the end of the bedroom, not directly out the
24 window, not as far as from here to that wall where
25 we were.

1 Q You could see the man and you could see the
2 police?

3 A Uh-huh.

4 Q Within the same several seconds; is that correct?

5 A Yes, ma'am.

6 Q Did that man have a gun?

7 A The man that was running?

8 Q Did he have a gun?

9 A I don't know.

10 Q You didn't see one, did you?

11 A I didn't see one.

12 Q They did not get in your house; is that correct?

13 A I'm sorry?

14 Q No one got into your house that day?

15 A No.

16 Q So no one took anything from you?

17 A No, ma'am.

18 Q The only person you saw was the one person?

19 A I saw one person.

20 MS. KELIUM: Those are all the questions I
21 have.

22 THE COURT: All right. You may step down.

23 Ladies and gentlemen, at this time we're
24 going to be in recess and take a break until

25 1:00. I expect we'll commence again the trial and

1 testimony at 1:00. Follow the instructions that I
2 have already given you and follow these as well.
3 Do not discuss this case with anyone not even
4 amongst yourselves. Do not allow anyone to try to
5 engage you in conversation about this case. Don't
6 try to find out anything about this case.
7 Everything that you can know about this case will
8 come to you from this witness stand and from the
9 evidence admitted during the trial. Should anyone
10 try to contact you about this case tell them
11 you're under a court order not to discuss it. If
12 they persist, then let Mr. Story, any of his
13 deputies, or any of the court officials know. If
14 there's a problem they'll get that to me and we'll
15 take care of it. Don't put yourself in an over
16 hearing parties, witnesses, or attorneys that
17 might be discussing this case at any time we're in
18 recess today. So if you're here in the courthouse
19 coming and going from the jury room, simply
20 isolate and insulate yourself from any contact
21 with anyone that might be discussing this case in
22 any regard.

23 With that everyone remain in here. Jury
24 you're excused. Come directly back to the jury
25 room and be in here at 1:00, and we'll start

1 again. Thank you.

2 (LUNCH BREAK)

3 (JURY PRESENT)

4 THE COURT: The record will reflect all
5 jurors present, parties present, counsel present.
6 Call your next witness.

7 MS. NEWSOME: Your Honor, the State calls
8 Charles Michael Gragg.

9 CHARLES MICHAEL GRAGG
10 called as a witness by the State, having been
11 first duly sworn, was examined and testified as
12 follows:

13 DIRECT EXAMINATION

14 BY MS. NEWSOME:

15 Q Mr. Gragg, please state your full name.

16 A Charles Michael Gragg.

17 Q Where do you reside?

18 A 3622 Country Club Road in Lanett.

19 Q Is your home located in Chambers County, Alabama?

20 A Yes, ma'am.

21 Q Like to direct your attention to March the 19th of
22 2002 and ask if you recall that particular day?

23 A Yes, ma'am.

24 Q Do you recall what you were doing that morning?

25 A Yes, ma'am. I was preparing to go to a board

1 meeting at Lanier Hospital. And we were going to
2 have to get ready to go on a trip. We were
3 leaving the next morning to go on a trip to meet
4 my wife's brother and his family. I was also
5 waiting for two young men who had been doing some
6 work on my farm for months. They were supposed to
7 have shown up early. It was a little before 10.
8 And they hadn't shown up yet.

9 Q Sometimes that morning did you have the occasion
10 to go to the utility room in your home and have a
11 conversation with your housekeeper Ms. Trammell?

12 A Yes, ma'am.

13 Q Did she at any time indicate to you that she had
14 noticed something unusual outside?

15 A Yes, ma'am.

16 Q What did she say to you?

17 A Well, I had actually opened the door that goes
18 from the utility room out onto the deck. Whenever
19 I passed Miss Pearl in the utility room -- I had
20 already been outside several times that morning.
21 I'm always joking with her. We'll talk back and
22 forth. I opened the door. I had stepped out onto
23 the deck. I still had the door knob in my hand.
24 Miss Pearl yelled out, Mr. Gragg, she said there's
25 a man out here with a mask on. And I heard what

1 she said. I heard every word. But I was having a
2 hard time registering because it was 10:00 on a
3 beautiful spring morning. About that time she
4 said there's another man out here with a mask on.

5 Q Did you notice anything about her tone of her
6 voice?

7 A She was -- you could tell she was pretty upset.

8 Q After you had an opportunity to digest this
9 information, what did you do?

10 A Well, it didn't take long to digest it. I slammed
11 the door and locked it. I told Miss Pearl as I
12 was grabbing for the telephone -- there's a
13 telephone right beside where she stands and irons
14 with her back to the window -- I told Miss Pearl
15 go find Judy -- that's my wife -- and for them to
16 get in the bedroom and stay away from the windows.
17 As I dialed 911 I reached in the closet, got my
18 shotgun. And I chambered three Magnum double
19 ought buckshot shells.

20 Q Had you seen any individual outside at the time
21 you loaded your weapon?

22 A No, ma'am.

23 Q Had Miss Pearl left the utility room by the time
24 you got your weapon?

25 A Just as I was getting the weapon out and was

1 talking -- the 911 dispatcher had answered -- Miss
2 Pearl was out of the utility room at that time
3 headed toward our master bedroom which is on the
4 lower level of the house.

5 Q You said you got your shotgun and loaded it?

6 A Yes, ma'am.

7 Q What were you planning on doing with the shotgun?

8 A Well, I went and stood by our fireplace which is
9 between our foyer and our family room where I
10 could see the front door and the French doors
11 coming in off the deck. I could see the French
12 doors coming in off my study. And I could see the
13 utility room. I couldn't see the door. I was
14 standing there. My intention was I was convinced
15 they were going to kick the door in. And I was
16 going to shoot whoever came through the door.

17 Q And you were prepared to do that as soon as
18 someone entered your residence?

19 A Yes, ma'am.

20 Q Had you given anybody permission to enter your
21 residence or attempt to enter your residence that
22 particular morning?

23 A Other than Miss Pearl, no.

24 Q Besides the individuals who were already in the
25 house, did anyone else have permission?

1 A No, ma'am.

2 Q Did you have any conversation with your wife after
3 Miss Pearl left the utility room?

4 A Well, I was -- I still at this point didn't know
5 my wife was upstairs. When I was standing by the
6 fireplace with my shotgun Miss Pearl came from up
7 the hall from the master bedroom. And she said I
8 can't find Miss Judy. I thought Judy had gone
9 outside. About that time I heard my wife. She
10 spoke from upstairs. And she said what's wrong.
11 So I knew that she was upstairs, and she was in
12 the house. Miss Pearl began describing to her,
13 she said there are two black men outside with
14 masks on. That's the first time that I had heard
15 the word "black" used. So I called -- I grabbed
16 the phone. I called 911 again and advised them
17 that the subjects were black.

18 Q As you got additional information you called back
19 to the 911 center and relayed the information as
20 you were getting it?

21 A Yes, ma'am.

22 Q Did you make any other calls?

23 A No, ma'am.

24 Q After that second call?

25 A No, ma'am.

1 Q Do you recall your wife trying to convey to you
2 that the police were going in the wrong direction?

3 A Well, I heard my wife yell they're going the wrong
4 way, they're running down by the barn. I had no
5 idea what they're going the wrong way meant.

6 Q You didn't know who that referred to?

7 A No, ma'am. But I understood it to mean when she
8 said they're running down by the barn that she was
9 talking about the people who were outside with
10 masks on.

11 Q Did you relay that information to anyone outside?

12 A In a very dangerous way. I did not know the
13 police had gotten there yet. And I went to the
14 front door with my shotgun pointed up in the air,
15 opened the double front doors, and started to step
16 out with my shotgun and was greeted by a Lanett
17 police officer with a automatic weapon pointed
18 just about right here.

19 Q Did you tell him what your wife had told you about
20 this individual running down by the barn?

21 A No, not at that point. I said I did not know you
22 were here yet. It was quite frightening. Then I
23 just stepped inside and shut the door.

24 Q Did you ever see either of the individuals that
25 were at your residence?

1 A No, ma'am.

2 Q How long did it take for the police to arrive?

3 A Well, at the time it seemed like an eternity. But
4 in reality it was no time at all. It was a matter
5 of two/three minutes I would guess. It was just
6 minutes.

7 Q Where is Hillcrest Cemetery in relation to your
8 house?

9 A Our house sits about 600 feet off Country Club
10 Road. And we have 94 acres. And the city
11 property, city cemetery property, borders our side
12 on the west side of our property.

13 Q Is the cemetery to the west of your house then?

14 A Yes, ma'am. To the east, I'm sorry. To the east.

15 Q To the east of your house?

16 A Yes.

17 Q Can you estimate the distance from your residence
18 to the cemetery?

19 A Well, to the property line itself it's probably
20 300 yards, maybe 1000 feet. But to the cemetery
21 itself it's a lot further because there's no
22 direct path. This was in the spring of the year.
23 And the woods are just thick, thick. Literally
24 there are places you would literally have to get
25 on your hands and knees and crawl through to get

1 through these woods, there are vines. They're not
2 just trees.

3 Q But it's your estimation that from your house to
4 the property line of the cemetery would be
5 approximately 300 yards to 1000 feet?

6 A Yes, ma'am.

7 Q I have already asked you if you had given anyone
8 permission to attempt to enter your house that
9 day. But did you specifically give Billy Norris
10 or Christopher McCullough permission to enter or
11 to attempt to enter your residence on that day?

12 A No, ma'am, I did not know either one of the two.

13 Q They did not have permission to be on your
14 property or to attempt to enter your residence; is
15 that right?

16 A No, ma'am, and my property is posted.

17 MS. NEWSOME: Thank you, Mr. Gragg. That's
18 all the questions I have.

19 THE COURT: Cross examination.

20 CROSS EXAMINATION

21 BY MS. KELIUM:

22 Q Afternoon, Mr. Gragg. I just have a few questions
23 for you.

24 A Okay.

25 Q You said the police got there in no time at all?

1 A Yes, ma'am.

2 Q Matter of minutes or less?

3 A Yes, ma'am.

4 Q So your property is posted. Posted against
5 trespassing?

6 A Yes, ma'am.

7 Q Is that what it says, no trespassing?

8 A Posted, no trespassing. There are a few signs
9 that say posted, no hunting or trespassing.

10 Q So anyone on your property that day without
11 permission would be trespassing?

12 A Yes, ma'am.

13 Q You said you were stationed in such a point in
14 your house that you were able to observe all the
15 of the entrances with exception of the utility
16 room where you could not quite see the door?

17 A No. There are actually another set of French
18 doors off of our master bedroom right off of the
19 deck. I could not see those. But I could see all
20 of the doors except the utility room. I could see
21 into the utility room.

22 Q You said you never saw any of these gentlemen?

23 A No, ma'am.

24 Q That were outside. So they never entered any of
25 the entrances you were watching?

1 A No, ma'am.

2 Q To your knowledge did they enter any entrance to
3 your house?

4 A No, ma'am.

5 Q To your knowledge did they get in your house in
6 any way?

7 A No, ma'am.

8 Q To your knowledge did they attempt to get in your
9 house?

10 A I'm convinced that was their intention.

11 Q To your knowledge, do you have any personal
12 knowledge that they actually attempted to get in?

13 A No, ma'am.

14 Q Didn't kick the door in? Didn't try to kick the
15 door in?

16 A No, ma'am.

17 Q You didn't see anybody and you didn't see anybody
18 with a gun; is that right?

19 A No, ma'am.

20 MS. KELIUM: That's all the questions I have.

21 THE COURT: Anything further from this
22 witness? You may step down. Thank you, sir. And
23 call your next witness.

24 MR. LISENBY: State calls Robbie Bettis.

25 ROBBIE BETTIS

1 called as a witness by the State, having been
2 first duly sworn, was examined and testified as
3 follows:

4 DIRECT EXAMINATION

5 BY MR. LISENBY:

6 Q Would you tell me your name, please, sir?

7 A Robbie Bettis.

8 Q Where are you employed?

9 A CSX Railroad.

10 Q I believe that's a new job?

11 A Yes, sir.

12 Q Prior to that where were you employed?

13 A Lanett Police Department.

14 Q How long had you been with the Lanett Police
15 Department?

16 A Thirteen years.

17 Q What was your position with the Lanett Police
18 Department?

19 A Lieutenant.

20 Q How long had you been a lieutenant?

21 A Right at 10 years.

22 Q Mr. Bettis, I want to direct your attention back
23 to March the 19th of 2002 and in regard to this
24 particular case ask if you were on duty that day?

25 A Yes, sir.

1 Q What were your duties during that day March the
2 19th?

3 A I was shift supervisor. We had received a call.
4 And there was a possible break-in on Country Club
5 Road, so instructed some of the guys to go on
6 toward the house. We was going to try to set up a
7 perimeter.

8 Q Let me ask you, as a shift supervisor what does
9 that entail? Tell me what you did as a shift
10 supervisor.

11 A The shift supervisor is pretty much responsible
12 for the officers on that shift and as far as also
13 I patrol and write tickets just as any other
14 officer does.

15 Q But you indicated in regard to this case when you
16 received some type of call out to a residence on
17 Country Club Road you also gave some additional
18 instructions; is that correct?

19 A Yes, sir. Anything serious, bank robbery or any
20 type crime in progress all the available people,
21 in fact, even the detectives I ask for their help.
22 That's the reason a lot of times plain clothes get
23 calls of that nature.

24 Q Did you also respond to this call yourself?

25 A Yes, sir, I did.

1 Q Do you recall about what time of the day it was?

2 A Roughly around 10:00 that morning.

3 Q Your best judgment after you received the call how
4 long was it before you, yourself, were in the area
5 of the residence?

6 A Pretty lucky. We were all on Cherry Drive. We
7 just had left the station. So it was about three
8 units. We were probably there within three or
9 four minutes, maybe even a little sooner. I
10 didn't look at the log.

11 Q Cherry Drive is the road that runs into Country
12 Club?

13 A Actually turns into Country Club Road, yes, sir.

14 Q You were actually on the road closest to the city
15 I guess?

16 A Yes, sir.

17 Q When you responded did you go to the residence?

18 A No, because a couple of units ahead of me were
19 already at Mr. Gragg's -- arrived at the house.
20 So I turned into the cemetery right before the
21 house.

22 Q Were you familiar with where this location was
23 that you were going to? You called it Mr. Gragg's
24 residence?

25 A Yes.

1 Q You say you turned into the cemetery?

2 A Hillcrest.

3 Q Hillcrest Cemetery. Describe for the members of
4 the jury as best you can how Hillcrest Cemetery
5 looks as far as drives and things of that nature
6 when you go into it.

7 A You turn in off of Country Club Road. The
8 cemetery is the road that runs directly down the
9 middle. It branches off. Wood line is around the
10 entire cemetery. And it's a couple of dirt roads
11 that some of the city workers uses to dump debris.
12 We're familiar because we've caught a lot of
13 people especially at night parking back there and
14 doing drugs and other things. So we watch that
15 area pretty -- especially on night shift. So
16 we're all familiar with some of the drives.

17 Q You say you were familiar with Mr. Gragg's
18 residence. Did you know if it had any connection
19 in and around that area?

20 A We have answered alarm calls. We're familiar with
21 that area pretty well.

22 Q Tell me when you responded to that area what you
23 did and what you observed.

24 A When I turned down into the cemetery, like I said,
25 mainly I was going down there to set up a

1 perimeter in case they did run out of the woods.

2 The last I heard they were in the woods. When I
3 got toward the -- entered the back of the cemetery
4 I noticed something shining through the woods. I
5 seen the vehicle coming out. I looked in it. It
6 was two black males in the vehicle. So I
7 activated my lights. I didn't know if they would
8 stop or not because it was obvious they was
9 involved. They did stop. That's when I conducted
10 the felony stop.

11 Q When you were responding what information do you
12 recall being given?

13 A It was two black males. As far as the masks, I
14 knew one mask. I wasn't sure about the bandanna.
15 I just knew they was supposed to have a mask and
16 possibly armed. That's about all the information
17 I got at the time.

18 Q You mentioned something about someone going toward
19 the wood line area?

20 A Yes, they were going towards the woods. That's
21 the reason I wanted to set up a perimeter in case
22 they did come out and I could see because the wood
23 line around the cemetery I could see a good ways.

24 Q After you said you activated your lights and the
25 vehicle did stop?

1 A Yes, sir.

2 Q Did you subsequently get the people out of the
3 vehicle?

4 A I called for backup as soon as I noticed them. I
5 really couldn't believe they was coming out like
6 that. I expected them to flee from the car.

7 MS. KELIUM: Objection, Your Honor, could he
8 answer the question he asked him.

9 THE COURT: Sustained. Go ahead next
10 question.

11 Q Did you subsequently get the people out of the
12 vehicle?

13 A I did.

14 Q You said you had called for backup. Did other
15 officers arrive?

16 A Yes, they did.

17 Q Do you recall what officers?

18 A First one was Sergeant Brown, Rick Brown.

19 Q Did other officers arrive after that?

20 A Yes, sir.

21 Q Do you recall how many officers responded to where
22 you were at?

23 A Lieutenant Carter, Lieutenant Whaley. There was a
24 couple of others. They were still in the woods
25 right then. But they were coming out. I think it

1 was Officer Wood, a couple more.

2 Q You indicated when you saw this vehicle that you
3 observed two black males in the vehicle?

4 A Yes, sir.

5 Q Is that how many people were actually in the car
6 once you got it stopped?

7 A Yes, sir.

8 Q With regard to that are either one of those
9 individuals in court today?

10 A Yes, sir.

11 Q Who is that, please?

12 A Christopher McCullough. He was the driver.

13 Q Can you just for the record indicate where you're
14 looking at to see Mr. McCullough?

15 A Right there.

16 MR. LISEBY: The record would reflect that
17 the witness has pointed at the defendant
18 Christopher McCullough.

19 Q And you indicated Mr. McCullough was the driver;
20 is that correct?

21 A Yes, sir.

22 Q Just in my mind I want to see if I can get clear
23 about this area where you actually observed the
24 car. You went to the cemetery area where you
25 observed the car. Were there cemetery plots?

1 A No, sir. The car was in the wooded area in the
2 line. As soon as you go to the very back of the
3 cemetery it's a little trail the city trucks use
4 to dump debris back there. It's not even a dirt
5 road, like a little logging road.

6 Q Do you have a judgment -- if you don't that's
7 okay -- do you have a judgment as to the distance
8 it would have been from where you first observed
9 the car to Mr. Gragg's house?

10 A It's not as long as a football field probably.
11 Probably about a football field length, probably
12 to the back to his property line through the woods
13 it's about that far if that far.

14 MR. LISEBY: Thank you, sir. Ms. Kelium may
15 have some questions for you.

16 THE COURT: Cross examination.

17 CROSS EXAMINATION

18 BY MS. KELIUM:

19 Q I just have a few questions for you, Mr. Bettis.
20 You said you responded within three or four
21 minutes of getting a call; is that correct?

22 A Somewhere.

23 Q There were several units you said were there
24 already at the residence?

25 A They were a little piece in front of me, yes,

1 ma'am.

2 Q In less than three minutes the police had
3 responded to a call there?

4 A Yes, between three and four minutes.

5 Q When you went back to the cemetery you saw this
6 car right away; is that right?

7 A Pretty much. I hadn't stopped rolling.

8 Q When you were making the stop and you say you
9 called for backup you said there were several
10 officers already coming through the woods; is that
11 correct?

12 A I don't know how far. They knew where I was at.
13 I called for backup and told them I think I got
14 the suspects.

15 Q Do you have any judgment about how long it took
16 them to get there?

17 A Well, Sergeant Brown had already turned around
18 because there was another unit in the area. He
19 was on me pretty much as I was getting them out of
20 the car.

21 Q He was there almost when you were?

22 A Pretty much, 30 or 45 seconds.

23 Q You made the statement that you were told that
24 these people were possibly armed; is that right?

25 A I was told that they had been possibly armed.

1 Q You heard none of the homeowners or the occupants
2 of the house had seen a gun? Would that surprise
3 you?

4 A No, ma'am. As far as the gun all I know that's
5 how it's dispatched to us, possibly armed.

6 Q So you don't know who gives you that information?

7 A When people are scared you don't know. You've
8 just got to take it from all the information.

9 Q You assume?

10 A Yes, ma'am, assume it.

11 Q That was just an assumption?

12 A Pretty much they said, possibly armed.

13 MS. KELIUM: That's all the questions I have.

14 THE COURT: Anything further from this
15 witness?

16 MR. LISENBY: No, sir.

17 THE COURT: Call your next witness.

18 MR. LISENBY: Lincoln Whaley.

19 LINCOLN WHALEY

20 called as a witness by the State, having been
21 first duly sworn, was examined and testified as
22 follows:

23 DIRECT EXAMINATION

24 BY MR. LISENBY:

25 Q Would you tell us your name, please, sir?

1 A Lincoln Whaley.

2 Q Where are you employed?

3 A Lanett Police Department.

4 Q What is your position with the Lanett Police
5 Department?

6 A Lieutenant.

7 Q How long have you been employed with the Lanett
8 Police Department?

9 A Almost eight years.

10 Q You indicated now you are a lieutenant, and you're
11 wearing a uniform. Are you in the patrol division
12 now?

13 A I'm a patrol supervisor.

14 Q Prior to your becoming patrol supervisor were you
15 in some other capacity with the Lanett Police
16 Department?

17 A Yes, sir, I was a detective.

18 Q If you would remember to keep your voice up.

19 A I have a real bad cold.

20 Q I want to direct your attention back to March the
21 19th of 2002 and ask if you were working that
22 particular day?

23 A Yes, sir, I was.

24 Q What position did you hold on that day?

25 A I was a detective.

1 Q Sometime that morning around 10:00 or so did you
2 become aware of some call out to Mike Gragg's
3 residence?

4 A Yes, sir, I was standing out there under the Sally
5 port with Officer Steven Wood. He actually got
6 the call, and the called sounded pretty bad. So I
7 jumped in the car.

8 MS. KELIUM: Objection, Your Honor, nature of
9 the call.

10 THE COURT: Overruled. Go ahead.

11 Q You were with Officer Wood?

12 A We were standing under the Sally port talking. I
13 heard the call go out. Normally I wouldn't jump
14 in the car with him. But it sounded bad, so I
15 dove in the car with him. And we headed towards
16 the Gragg residence.

17 Q You and Officer Wood went in one vehicle?

18 A Yes, sir.

19 Q What kind of vehicle was that? I mean was it a
20 patrol or plain car?

21 A It was a marked police car.

22 Q Tell me what happened as you went to that area.

23 A Drove up, turned until we found the residence.
24 Didn't know whose residence it was at the time.

25 We go by numbers and addresses. We turned in the

1 driveway, fairly long driveway. It's curvy. We
2 accelerated because it's a long way. We were
3 trying to get there. Up the driveway, got out of
4 the car. I covered the yard. And Officer Wood
5 went toward the front door.

6 Q Tell me what you mean by covered the yard.

7 A I drew my weapon, and I began to cover behind us
8 watching for him and myself as he approached the
9 residence.

10 Q Do you recall what information you were given as
11 to looking out for any individual or individuals?

12 MS. KELIUM: Objection, Your Honor. That's
13 all hearsay as what was told to him.

14 MR. LISEBY: First of all, I simply asked
15 did he recall.

16 THE COURT: Overruled.

17 Q Do you recall being given information about
18 looking out for an individual or individuals?

19 A The dispatch advised there were two guys --

20 MS. KELIUM: Objection, Your Honor. His
21 response is hearsay. And it's nonresponsive to
22 the question. As far as I know the dispatcher is
23 not here.

24 THE COURT: Overruled.

25 Q You may go ahead and answer.

1 A Dispatch advising that there was two guys crouched
2 down under the window with a mask on.

3 Q The air conditioner has come on, Lincoln.

4 A I'll do my best. I'm pretty sick.

5 Q You had information to be on the lookout for two
6 people?

7 A Yes, sir.

8 Q Did other officers other than you and Officer Wood
9 respond?

10 A Yes, sir. While we were there at the residence
11 Mr. Gragg came out and gave us the direction the
12 guys ran. Officer Ben Brown drove up. And we
13 headed towards the barn. And he was backing up,
14 Officer Wood and I.

15 Q Do you know if other officers were responding in
16 the area around the Gragg residence?

17 A Yes, sir. Every officer that was on duty was en
18 route there. We were just the first ones to get
19 there.

20 Q Do you have a judgment as to about how long it was
21 before you arrived at Mr. Gragg's residence?

22 A Say a minute, travel time from the PD roughly a
23 mile and a half maybe to his residence.

24 Q Now, when you said after arrival you received some
25 more information about where to look for an

1 individual; is that correct?

2 A Yes, sir.

3 Q Did you go out to that area?

4 A When we drove up Mr. Gragg came out of the
5 residence and said they ran towards the barn.
6 Officer Wood and I headed towards the barn. As we
7 were going down we were told by dispatch that they
8 were headed towards the wood line. We turned to
9 go towards the wood line. Officer Brown, Ben
10 Brown, went towards the barn.

11 Q While you were out there in and around Mr. Gragg's
12 residence did you see any other individuals?

13 A No, sir.

14 Q Other than police officers and Mr. Gragg?

15 A No, sir.

16 Q Subsequent to that did you become aware of a
17 vehicle being stopped somewhere near the area?

18 A As we got to the wood line -- we never like to
19 walk into a wood line anyway. As we got closer we
20 slowed down and began to look. We heard on the
21 radio transmitter that Lieutenant Bettis had a
22 vehicle stopped in the cemetery. At that point we
23 ran back to our unit, up the hill, and through the
24 pasture, jumped in our car and headed to the
25 cemetery.

1 Q What did you see when you got there?

2 A Lieutenant Bettis and Sergeant Brown was there and
3 they had two black males out of the car.

4 Q Are any of those individuals present in court
5 today?

6 A Yes, sir.

7 Q Where?

8 A Mr. McCullough.

9 Q The defendant in this case?

10 A Yes, sir.

11 Q You said he was on the ground when you initially
12 saw him?

13 A Yes, sir.

14 Q Did you observe something on or about him that you
15 subsequently retrieved?

16 A He had a ski mask in his back pocket.

17 Q Let me show you what's been marked as State's
18 Exhibit Number 4. And take a look at the envelope
19 initially and then when you're through with that
20 open it up and look into the contents for me.

21 A That's the mask that we recovered.

22 Q Let me first ask you about the envelope. Do you
23 recognize the envelope?

24 A Yes, sir.

25 Q How do you recognize that?

1 A My writing, I filled it out.

2 Q The contents of number 4 you pulled out, do you
3 recognize that?

4 A Yes, sir.

5 Q What is that?

6 A It's a blue ski mask.

7 Q Where was that recovered?

8 A From the back pocket of Mr. McCullough.

9 Q On his person?

10 A On his person.

11 MR. LISEBY: We would offer Exhibit Number
12 4, Your Honor.

13 THE COURT: Admitted.

14 (State's Exhibit 4, mask, admitted.)

15 MR. LISEBY: May we show this to the jury?

16 Q Did other officers and other detectives also
17 arrive at the scene?

18 A Yes, sir.

19 Q Were you present during a subsequent search of the
20 vehicle?

21 A I was present, but I was on the phone with Mr.
22 Clark the entire time. After that point I had
23 stepped away and getting information and advice
24 from him.

25 MR. LISEBY: Thank you, sir. Ms. Kelium may

1 have some questions.

2 CROSS EXAMINATION

3 BY MS. KELIUM:

4 Q I just have a couple, Officer Whaley. You got
5 there within a minute is basically what you said?

6 A Roughly.

7 Q A mile and a half down there. So about a minute.
8 Y'all responding, got the call, you got there in a
9 minute. You said you received directions about
10 where these individuals or individual went.

11 Direction towards the wood line?

12 A Yes, ma'am.

13 Q You were fairly close behind them at that point;
14 is that right?

15 A We never saw anyone. This is a pretty large
16 residence. And the driveway comes up to the front
17 door. We walked to the door. As I was turned
18 around backwards to the cover the area of the
19 yard. I heard Officer Wood get startled. I
20 turned around and saw Mr. Gragg and the shotgun
21 coming out the door.

22 Q This is all happening within a matter of a minute
23 of arriving, right?

24 A Yes, ma'am.

25 Q This didn't happened over 20 minutes?

1 A No.

2 Q You get up the wood line and you hear a car has
3 been pulled over?

4 A Yes, ma'am.

5 Q You never saw Mr. McCullough or anybody else until
6 you got down to the car; is that right?

7 A That's correct.

8 Q You never saw any individuals in that yard at all
9 on Mr. Gragg's property other than Mr. Gragg and
10 the other officers?

11 A Right.

12 MS. KELIUM: I don't have any further
13 questions.

14 THE COURT: You may step down.

15 MR. LISEBY: State calls Billy Norris.

16 BILLY RALPH NORRIS, JR.

17 called as a witness by the State, having been
18 first duly sworn, was examined and testified as
19 follows:

20 DIRECT EXAMINATION

21 BY MR. LISEBY:

22 Q Mr. Norris, this is kind of a big room and the air
23 conditioner has started running on us. You'll
24 have to speak up loud for me, okay?

25 A Yes.

1 Q Can you tell me your name, please?

2 A Billy Ralph Norris.

3 Q Where are you presently living?

4 A Living at Draper Institution.

5 Q Last part?

6 A Draper Correctional Center.

7 Q You're in prison; is that correct?

8 A Yes, sir.

9 Q And in regard to this particular case, Mr. Norris,
10 you entered a guilty plea back on October the 17th
11 and received a 20 year sentence with this; is that
12 correct?

13 A 24.

14 Q I think on this particular case it was 20.

15 A Twenty on this one.

16 Q Is this your signature there on this document?

17 A Yes, sir.

18 MR. LISEBY: We would offer Number 7, Your
19 Honor.

20 THE COURT: Admitted.

21 (State's Exhibit 7, plea, admitted.)

22 MR. LISEBY: Show this to the jury?

23 THE COURT: Yes.

24 Q Mr. Norris, do you know the defendant in this case
25 Chris McCullough?

1 A Yes, sir.

2 Q How long prior to the incident that we're about to
3 talk about would you say you knew Mr. McCullough?

4 A Since I moved to -- I'm 28 now. Since I was like
5 14.

6 Q I'm having a hard time hearing you. Probably not
7 doing a lot of talking.

8 A 14 years.

9 Q You have known him for 14 years?

10 A Yes.

11 Q With regard to this case I want to direct you back
12 to March the 19th of 2002 and ask if that morning
13 you had the occasion to see Mr. McCullough
14 somewhere?

15 A Yes, sir, I seen him that morning. He came to
16 pick me up at the Kroger's store down in Lanett,
17 Alabama. I seen him that morning.

18 Q You said he came to pick you up; is that correct?

19 A Yes.

20 Q Do you recall what kind of vehicle he was in?

21 A Gray, Mustang GT.

22 Q Did you and he go someplace?

23 A Yes, sir.

24 Q Where did you go to?

25 A Out on Country Club Road out on -- I don't know

1 exact address, Mr. Gragg's.

2 Q Did you know Mr. Gragg at that time?

3 A No. I didn't know him. I just know the name on
4 the document out Country Club Road out passed the
5 housing project.

6 Q I know they're having a hard time hearing. Mr.
7 Norris, I'm sorry. If you'd remember to keep your
8 voice up, okay?

9 A Yes, sir.

10 Q Let me ask you that last question again. You said
11 you went out to an area of Mr. Gragg's residence.
12 Did you know him prior to that day?

13 A No, I didn't know him prior to that day. Like I
14 said, I just see his name -- it was Gragg I seen
15 on the paper they served me with. I didn't know
16 him prior to that day.

17 Q Now, when Mr. McCullough picked you up at Kroger
18 did you and he have any conversation about what
19 you were going to do?

20 A We had a conversation. Said he had just come back
21 from the food stamp office up here in Lafayette
22 from taking his girlfriend. He had seen a house
23 out on Country Club Road that we should check
24 out. He asked me to get in the car. I got in the
25 car with him.

1 Q What happened then?

2 A I seen some like duct tape in the car. And I
3 asked him what it was for. He said we probably
4 need this.

5 Q What happened then?

6 A Rode out there. He said the house kind of far
7 from the road, off in the woods behind some pine
8 trees. You see a bunch of pine trees. Can't see
9 the house. He said we needed somewhere to put the
10 car at. He drove up the road. There's a cemetery
11 up the road down in like a ditch like in a hole
12 like the cemetery down there. We drove down
13 there, and the back of the cemetery -- back of the
14 cemetery like a dirty area like people might ride
15 four wheelers or something out there. We parked
16 the car behind some brush.

17 Q Who was driving the car at this time?

18 A Oh, he was driving.

19 Q Mr. McCullough was driving the car?

20 A Yes, sir.

21 Q And y'all went up into the cemetery?

22 A Yes, sir.

23 Q You said something about the area was dirty or
24 looked like where four-wheelers had been?

25 A Yes, the cemetery goes in like a horseshoe shape.

1 Down below the cemetery is a area back there like
2 people drive off into the woods like four-wheelers
3 or motorcycles or whatever. If you go down in
4 there we parked the car behind some brush where
5 couldn't nobody see us if they come down into the
6 cemetery.

7 Q What happened then?

8 A He asked me if I had anything in my pocket, empty
9 my pockets where I wouldn't have anything in my
10 pockets or anything. I had a blue bandanna and
11 some gloves. He got out of the car. He had a ski
12 mask.

13 Q Did you see where he got the ski mask from?

14 A It was in the car.

15 Q You said you had a blue bandanna with you?

16 A Yes, sir, I had a blue bandanna.

17 Q And some gloves?

18 A Some gloves.

19 Q What kind of gloves are you talking about?

20 A They weren't leather gloves, just like blue
21 fiber-like gloves.

22 Q What I might describe them as work gloves? Is
23 that what you're talking about?

24 A They wasn't necessarily work gloves. Just some
25 gloves I had on, blue gloves I had on my hands. I

1 had a blue bandanna. He had a ski mask. I seen
2 him. He got out the car and he put a pistol into
3 his pants.

4 Q Could you tell us what the pistol looked like that
5 you saw?

6 A It was a chrome Beretta 9 mm.

7 Q Did you see where he got that from?

8 A Out of the car. It was in the car.

9 Q What happened then?

10 A I had went off ahead of him. He was coming behind
11 me. We got on into the woods. We crossed the
12 stream like, I guess a little stream. And we went
13 running through the woods. We jumped the stream
14 and went on where the house -- side of the house
15 barb wire fence.

16 Q Let me ask you this. When you were either while
17 y'all were in the car or when you were going
18 toward the house, for what purpose were you going
19 to this house?

20 A Like I say, I didn't know if anyone was at the
21 house or anything. Really the purpose was he just
22 said he had picked me up -- I wanted to know was
23 anything at the house. He said didn't look like
24 no one was at the house.

25 Q If no one was at the house, what were you going to

1 do?

2 A The intention was probably to burglarize the
3 house.

4 Q Y'all were going to try to take something?

5 A Right.

6 Q Y'all were approaching the house. And what did
7 you do with your bandanna while you were
8 approaching the house?

9 A I had my bandanna already tied around my face
10 except my eyes.

11 Q What about Mr. McCullough? Did he have anything
12 on his face?

13 A Mr. McCullough got in the yard, he put his ski
14 mask on.

15 Q You mentioned something earlier about duct tape?

16 A Yes, sir. I didn't have the duck tape. I didn't
17 see him get the duck tape. I really don't know if
18 the duck tape was there. I know it was in the car
19 when I got in the car because I asked him what was
20 it for.

21 Q You had originally seen it in the car?

22 A I had seen it at Kroger in the car. That's when I
23 asked him what it was for by the passenger seat.
24 I asked him what it was for. He said we'd
25 probably need that. But when I got out of the car

1 I said all I need was my bandanna. I took
2 everything out my pockets but my gloves. And I
3 got out ahead of him. But I seen him get out of
4 the car. I seen his ski mask. He went into the
5 trunk behind the seat. There was a speaker box,
6 went behind the speaker box and got a pistol from
7 back there. Like I say, I didn't see any duct
8 tape. I don't know if he left it in the car,
9 forgot it, or whatever. We went up to the house.

10 Q Tell me what happened when you got up to the
11 house.

12 A Got up to the house I went to one side of the
13 house, and he went to one side of the house. We
14 decided we'd look in the window and see if we see
15 anybody.

16 Q Did you see anybody when you looked in?

17 A The side of the house I was on I didn't see
18 anyone. I didn't see anyone on the side of the
19 house I was on.

20 Q What happened then?

21 A I went to the front, and I met him. On the side
22 of the house he had said he had checked the window
23 and wasn't nobody in the house. But it was a
24 window on the back side of the house that was kind
25 of high. He couldn't see in it. The height I am

1 I'm taller than him. I looked into it.

2 Q Did you seen anything in it?

3 A When I looked into it I seen a black woman with
4 her back turned to me with a yellow blouse and
5 folding clothes. Naturally I thought she probably
6 worked there or lived there or whatever. But I
7 knew someone was in the house.

8 Q What happened then?

9 A After then I told him, I said, man, somebody was
10 in the house. We need to leave, get out of here.
11 He was like, well, this house right here is too
12 good. We need to get this because, you know, he
13 had a pistol and this and that. So really I
14 didn't really --

15 MS. KELIUM: Is this responsive to any
16 questions, Your Honor?

17 THE COURT: Is that an objection?

18 MS. KELIUM: That's an objection.

19 THE COURT: Sustained.

20 Q So when you looked in and saw a person, you had a
21 conversation then with Mr. McCullough. What's the
22 next thing that happened?

23 A I had the conversation with him that we should
24 leave here. He said the house was too good. We
25 need to get this and that. I didn't really want

1 to go in the house. We were like getting into a
2 conversation then out there.

3 Q Y'all were talking back and forth to each other?

4 A Talking back and forth. Then I said I think I
5 heard somebody say they seen somebody.

6 Q What did you do?

7 A Then I went in front of the house. I hear like
8 motors revved up coming through the driveway
9 because it's a long driveway from the road. I
10 thought it was the police.

11 Q What happened then?

12 A I took off running. He took off behind me.

13 Q What happened to Mr. McCullough?

14 A He was behind me. I jumped the barb wire fence
15 there. When I jumped over the fence he came over
16 the fence, and he tripped. And the pistol fell.
17 And I picked the pistol up. And he got up and
18 came behind me. When we got to the car, both of
19 us got in the car, everything was in the car. He
20 crunk up and was leaving out.

21 Q When you got into the car who was driving?

22 A He was driving. I wasn't driving.

23 Q Where were you at?

24 A I was on the passenger side.

25 Q What happened then?

1 A We left out. We was leaving out fixing to get
2 back into the cemetery. And the police came down
3 in the cemetery. Police did that and arrested us.

4 Q Was that a patrol car?

5 A Patrol car.

6 Q Did they get you out of the vehicle?

7 A Yes, he said to put our hands out the window. I
8 did. We got out of the vehicle. And I laid on
9 the ground. Both of us got out of the vehicle.
10 He got us out of the vehicle. He called back-up.
11 More police came. I was face down on the ground
12 and handcuffed and everything. We sat out there
13 for like -- I really don't know how many hours it
14 was. They searched the car and found the pistol
15 and everything in there. After that we stayed --

16 MS. KELIUM: Objection again as responsive to
17 any questions that have been asked.

18 THE COURT: Sustained.

19 Q They take you to the police department?

20 A Yes. We stayed there a while.

21 MR. LIENBY: Ms. Kelium may have some
22 questions.

23 CROSS EXAMINATION

24 BY MS. KELIUM:

25 Q I have just a few. So you were wearing a bandanna

1 on your face, right?

2 A Yes, ma'am.

3 Q Why were you wearing a bandanna on your face? Is
4 it because so no one could identify you; is that
5 right?

6 A Yes, ma'am.

7 Q You're saying Chris McCullough had a gun?

8 A Yes.

9 Q 9 mm?

10 A Yes.

11 Q Pretty big gun?

12 A Yes.

13 Q Had it in his pocket?

14 A No, front of his pants.

15 Q In the front of his pants?

16 A Yes.

17 Q Sticking out?

18 A I didn't never say it was in his pocket. In his
19 pants with his shirt over it.

20 Q Sticking out of the front of his pants?

21 A With his shirt over it.

22 Q And he had duct tape; is that right?

23 A It was in the car when he picked me up.

24 Q In the car. So you say you see somebody in the
25 house; is that right?

1 A Yes.

2 Q You said Mr. McCullough was shorter than you, so
3 he couldn't see in that window?

4 A No, he couldn't.

5 Q You see somebody in there. You didn't run off
6 though, did you?

7 A No, I told him that I had seen someone.

8 Q If you were worried about somebody seeing you, why
9 didn't you just run off then?

10 A I was going to tell him. I was with him.

11 Q Y'all had this conversation. How long did that
12 last?

13 A It really didn't last long, I don't know or what.
14 But the police came not too long after that.

15 Q So you took off running?

16 A Yeah, I hear the motor running. I took off
17 running with him behind me.

18 Q You say he ran after you?

19 A Yes.

20 Q Even though you have a mask covering your face and
21 nobody can recognize you, you're going to
22 voluntarily take off, right?

23 A Yes.

24 Q Because you don't want to get caught by the
25 police; is that right?

1 A Well, someone was in the house, and I told him.

2 Q You didn't take off when you saw somebody. You
3 said that?

4 A I told him first because I was with him. I just
5 didn't take slap off after I seen them. I told
6 him that I had seen someone. Someone was in
7 there. I heard -- said I heard someone say I
8 think I seen somebody. Right after that the
9 police -- the car was revving up the driveway. I
10 took off running. I was really going to take off
11 running when I said I seen somebody. But I heard
12 a car. So I was going to run automatically
13 anyway.

14 Q You plead guilty to this charge, is that right,
15 attempted burglary first degree?

16 A Yes, I did.

17 Q Got 20 years?

18 A Yes.

19 Q Not your first felony, right? You're the same
20 Billy Ralph Norris that was convicted of
21 aggravated assault in 2001, right?

22 A Yes, in Georgia.

23 Q With felony offense of aggravated assault?

24 A My wife.

25 Q Is that a yes? You are the same person that was

1 convicted of the felony offense of aggravated
2 assault?

3 A Yes.

4 Q You were also convicted on the same day on April
5 4th, 2001, of giving a false name to a police
6 officer, right?

7 A Giving what?

8 Q I can show it to you if you forget.

9 MR. LISEBY: Ask the question.

10 THE COURT: I don't think he understood your
11 question. Ask the question again.

12 Q Are you the same Billy Ralph Norris, Jr. who was
13 convicted on April 4th, 2001, of giving a false
14 name to a law enforcement officer?

15 A Which state?

16 Q That was in Georgia. Would you like me to show it
17 to you?

18 A Yes.

19 MR. LISEBY: Approach just a moment, Your
20 Honor.

21 (The following occurred at the bench
22 outside the hearing of the jury.)

23 MR. LISEBY: According to this record he was
24 given first offender treatment in Georgia. That's
25 not a felony conviction.

1 MS. KELIUM: Says felony conviction.

2 MR. LISENBY: Once you receive first offender
3 it's not a felony conviction. Believe me, I have
4 dealt with that on several occasions. It's not a
5 conviction.

6 MS. KELIUM: Not same as you have.

7 MR. LISENBY: Right, it's different. It can
8 be discharged completely.

9 MS. KELIUM: Could be, but was it?

10 MR. LISENBY: We don't know that.

11 THE COURT: This is equivalent of youthful
12 offender, is it not?

13 MR. LISENBY: No, sir. It's actually more
14 expansive than youthful offender.

15 MS. KELIUM: That is generous. In some
16 respects it is different. The fact that they can
17 expunge it. It's not sealed. It is a felony
18 conviction.

19 MR. LISENBY: That's not completely true. I
20 had to write a brief on this for a case involving
21 an individual here. It's an offense that can be
22 given to any individual regardless of age. And
23 when given first offender treatment it's something
24 that they do not impose the sentence at all until
25 after a period of time takes place which they go

1 back in and determine whether or not the person
2 should or should not be found guilty of the
3 offense.

4 MS. KELIUM: Been found guilty --

5 THE COURT: Do you have any case law from
6 Georgia as to how it's classified.

7 MR. LISENBY: I do have some. It would take
8 me a little bit of time to dig it up. Like I
9 said, I had to write a brief on a fellow that was
10 convicted over here on manslaughter. I can do
11 that. I guess the concern I have is at this
12 point it's already out there in front of the jury.

13 MS. KELIUM: Saying you want a mistrial?

14 MR. LISENBY: Well, no.

15 MS. KELIUM: Otherwise, it's out there.

16 MR. LISENBY: I like this jury. And I like
17 the way the evidence is going. I don't want to do
18 that. If we can get the Court or however the
19 Court wants to do it in some way indicate that
20 these convictions are under Georgia's first
21 offender law.

22 MS. KELIUM: He's got a felony since then. So
23 what's the effect of that?

24 MR. LISENBY: Until they do something,
25 nothing.

1 THE COURT: I'll have to give an instruction.

2 MS. KELIUM: I have got another one that's
3 here.

4 THE COURT: Move on.

5 (Jury Present)

6 BY MS. KELIUM:

7 Q Are you the same Billy Ralph Norris, Jr. that was
8 convicted on March 14th, 2001, for giving a false
9 name to a law enforcement officer here in this
10 county?

11 A Officer who?

12 Q Huh?

13 A Officer who?

14 Q Giving a false name to a law enforcement officer
15 is what you were convicted of on March 14th, 2001,
16 true, in Chambers County, Alabama?

17 A Yes, I am.

18 Q So you have lied to the police before? Yes?

19 A If that's yes, I was convicted.

20 Q You gave the police a statement this time, didn't
21 you?

22 A Yes, I did.

23 Q You told them what you have been telling us today,
24 right?

25 A Yes.

1 Q Chris took you out to this house?

2 A Yes.

3 Q Chris had a gun?

4 A Yes.

5 Q Chris had a mask?

6 A Yes.

7 Q You wanted to leave, Chris didn't? Is that your
8 statement?

9 A I never stated that I wanted to leave and Chris
10 didn't. I stated that I seen somebody in there.
11 I've never said that I told him that I wanted to
12 leave. I was telling him -- like I said, on my
13 statement I seen someone in the house. I told
14 Chris we ought to leave.

15 Q And the rest of what you said is Chris didn't want
16 to leave and you didn't?

17 A He said that we shouldn't. He had the gun. He
18 said the house was too good.

19 Q Your statement is Chris found the house, Chris
20 drove you there, Chris had a gun, Chris wanted to
21 hang out and you wanted to leave. But you didn't
22 do anything, right?

23 A I wanted to leave when I seen somebody. Like I
24 said, I wanted to leave when I seen someone in the
25 house. Because this crime not here just this

1 one. I burglarized the house, but I knew no one
2 was at them houses. If someone out there I don't
3 like to carry a gun.

4 Q You had a bandanna on that day, sir, to obscure
5 your face so nobody could find you?

6 A Yes.

7 Q So nobody could tell who you were?

8 A Yes.

9 Q So you would not be caught?

10 A Yes.

11 Q So you would not get in trouble, right?

12 A Yes.

13 Q That's the whole point. You have lied to the
14 police before for the same reason, right? You
15 lied to the police so that you would not be
16 detected just like a mask to get out of trouble;
17 is that right?

18 A Them cases they got where they say I lied to the
19 police --

20 Q The cases we talked about, the one here, you lied
21 to the police so that you would not be detected
22 just like you were here, just like wearing a mask,
23 right? Is that why you were lying to the police?

24 A Well, I told them my name later on.

25 Q But you lied to begin with to avoid detection,

1 right?

2 A Situation when they caught me.

3 Q Are you going to answer my question, or should I
4 have the Judge instruct you to answer the
5 question?

6 A I answered the question.

7 Q You lied to the police before to avoid detection?

8 A Yes.

9 Q You lied to the police so that you wouldn't get in
10 trouble?

11 A Yes, ma'am.

12 MS. KELIUM: That's all I have.

13 THE COURT: Anything further from the State
14 from this witness?

15 MR. LISEBY: No, Your Honor. May this
16 witness be excused?

17 THE COURT: You may step down.

18 MR. LISEBY: State calls Jeff Blackstone.

19 JEFF BLACKSTONE

20 called as a witness by the State, having been
21 first duly sworn, was examined and testified as
22 follows:

23 DIRECT EXAMINATION

24 BY MR. LISEBY:

25 Q Would you tell us your name, please, sir?

1 A Jeff Blackstone.

2 Q Where are you employed?

3 A Chambers County sheriff's department.

4 Q What is your present position with the sheriff's
5 department?

6 A Chief investigator.

7 Q How long have you been with the sheriff's
8 department?

9 A Ten years.

10 Q How long have you been involved in investigation?

11 A Five years.

12 Q I want to direct your attention back to March the
13 19th of 2002. And on that day did you have the
14 occasion to see the defendant in this case Chris
15 McCullough?

16 A Yes, I did.

17 Q Where were you at when you saw him?

18 A Lanett Police Department.

19 Q Did you have the occasion on that day to advise
20 Mr. McCullough of his constitutional rights?

21 A Yes, I did.

22 Q How did you go about doing that?

23 A We have a rights form we use and read him his
24 rights off the form.

25 Q I want to show you what is marked as State's

1 Exhibit Number 1 and ask if you recognize that?

2 A Yes.

3 Q What is that, please?

4 A Copy of the rights form that I read Mr.
5 McCullough.

6 Q You said that's a copy; is that correct?

7 A Yes, sir.

8 Q Any changes, marks, or alterations other than the
9 State's exhibit marker from the original that you
10 maintained?

11 A No, sir.

12 Q You indicated that you advised Mr. McCullough of
13 some constitutional rights; is that correct?

14 A Yes.

15 Q Did you do that off this form, the original of
16 this form?

17 A Yes, sir.

18 Q If you would tell the members of the jury what
19 rights, if any, you advised Mr. McCullough off?

20 A I read Mr. McCullough's right and advised him he
21 had the right to remain silent, anything he said
22 will be used against him in a court of law. You
23 have a right to a lawyer and have him present with
24 you while you're being questioned. If you cannot
25 afford to hire a lawyer one will be appointed to

1 represent you before any questions if you wish, if
2 you decide at any time to exercise these rights
3 and not answer any questions.

4 Q Is there something else on that form with regard
5 to those rights?

6 A Yes.

7 Q What is that?

8 A It's a waiver of rights that I read him. I have
9 read this statement of my rights or had them read
10 to me and understand what my rights are. I am
11 willing to waive these rights and make a
12 statement. No promises or threats have been made
13 to me or pressure or coercion of any kind has been
14 used against me.

15 Q In some manner did Mr. McCullough acknowledge that
16 he understood each of the rights that you read to
17 him?

18 A Yes, he did.

19 Q How did he do that?

20 A I gave him the form and told him to read it again
21 himself and as he read his rights to initial what
22 he read. And the top part is one through five.
23 And he initialled every time he read one.

24 Q With regard to the waiver of rights portion in
25 some way did he acknowledge that he understood

1 that and was willing to speak?

2 A Yes, sir.

3 Q How did he do that?

4 A He signed the form.

5 Q Was that in your presence?

6 A Yes, sir.

7 Q Were there other officers present?

8 A Yes, there was.

9 Q Did you note that on the form that you have?

10 A Yes, sir.

11 Q Who were other officers present?

12 A It was Kenny Vines, Lafayette PD; Steve Smith,
13 Lafayette PD, Mike Looser from Chambers County
14 sheriff's department; myself Chambers County
15 sheriff's department. And also Lincoln Whaley he
16 was in. But when I read the rights he had walked
17 out when I took the statement.

18 Q There also a place on the top of that form for
19 place, date, and time. You see that?

20 A Yes.

21 Q Did you fill that out?

22 A Yes, I did.

23 Q Can you tell the members of the jury what that is?

24 A The place was Lanett PD, the date was 3/19/02, and
25 the time was 14:47 which was 2:47 central time.

1 Q Why is it that you have a central time zone time
2 on there?

3 A The time zone splits the county. One-half the
4 county is an hour behind the other half.

5 Q Why did you use central time?

6 A Because I work on central time.

7 Q Your main office is here in Lafayette on the
8 central time zone; is that correct?

9 A That's correct.

10 MR. LISEBY: At this time we would offer
11 State's Exhibit Number 1.

12 THE COURT: Admitted.

13 (State's Exhibit 1, statement,
14 admitted.)

15 Q Investigator Blackstone, after you advised Mr.
16 McCullough of his rights -- before you advised Mr.
17 McCullough of his rights for that matter did you
18 or anyone in your presence threaten or coerce him?

19 A No.

20 Q Did you or anyone in your presence promise him
21 anything or offer him any hope of reward?

22 A No.

23 Q Did you or anyone in your presence tell him it
24 would be better for him to make a statement as to
25 not make a statement?

1 A No, I didn't.

2 MR. LISEBY: May we show State's Exhibit 1?

3 THE COURT: Yes.

4 MR. LISEBY: Thank you, investigator. Ms.
5 Kelium may have some questions for you.

6 CROSS EXAMINATION

7 BY MS. KELIUM:

8 Q I just have a couple. Investigator Blackstone,
9 this waiver of rights form says that he's willing
10 to waive these rights and make a statement. Is
11 that what's printed on that?

12 A Yes, ma'am.

13 Q A waiver of rights form?

14 A Yes.

15 Q That's not something that the person would write
16 in there to make a statement?

17 A No, ma'am. It's in the waiver, bottom portion of
18 the waiver.

19 Q I'm referring specifically to State's Exhibit
20 Number 1. Is there a place on this waiver of
21 rights form -- first of all this is a form, right?

22 A Yes.

23 Q One of a whole big stack you've got printed that
24 are exactly the same?

25 A All the same.

1 Q With the exception of this one that's filled in?

2 A That's correct.

3 Q It got filled in from a blank one which is one of
4 several hundred or more that are laying around?

5 A That's correct.

6 Q Is there a different form that you use for a
7 waiver of rights for somebody to sign that's not
8 going to make a statement?

9 A No, the same form.

10 Q As long as they said they understood their rights
11 you use this form, but then thereafter they may
12 not give you a statement, right?

13 A They may not.

14 Q They may not answer any of these questions?

15 A If they don't I usually put on the form refuse to
16 give a statement.

17 Q So this would be the same form no matter what they
18 decided to do?

19 A This is the same form I read to everybody.

20 MS. KELIUM: That's all the questions I have.

21 THE COURT: You may step down.

22 MR. LIENBY: May this witness be excused?

23 THE COURT: Yes, he is excused.

24 (The following occurred at the bench
25 outside the hearing of the jury.)

1 MS. LISEBY: I'm going to call Lieutenant
2 Carter. The video takes about 30 or 40 minutes.

3 MS. KELIUM: I had talked to Bill about fast
4 forwarding. It's like watching paint peel for
5 most of it. It's like watching paint peel with my
6 client lying on the ground in handcuffs for 30
7 minutes. And virtually nothing is gained from
8 that.

9 MR. LISEBY: We may fast forward through
10 parts of it, but there are other parts. That's
11 not the only thing we have. I wondered if you
12 wanted to take a break was the only reason I came
13 up here.

14 THE COURT: You say be 30 or 40 minutes at
15 least.

16 MR. LISEBY: Overall testimony is going to
17 be at least that long.

18 (JURY PRESENT)

19 THE COURT: Ladies and gentlemen, the next
20 witness may take 40/45 minutes or longer. Would
21 y'all like to take a break at this time before we
22 start the next witness? Let's just go ahead and
23 start. Call your next witness.

24 MR. LISEBY: Call Richard Carter.

25 RICHARD CARTER

1 called as a witness by the State, having been
2 first duly sworn, was examined and testified as
3 follows:

4 DIRECT EXAMINATION

5 BY MR. LISENBY:

6 Q Would you tell us your name, please, sir?

7 A Richard Carter.

8 Q Where are you employed?

9 A With the Lanett Police Department.

10 Q What is your present position with the Lanett
11 Police Department?

12 A I'm the lieutenant in charge of the detective
13 division.

14 Q How long have you been employed at the Lanett
15 Police Department?

16 A About 12 years and 4 months.

17 Q How long have you been involved in investigations?

18 A About 7 years and 4 months.

19 Q You said you were now the head of the detective
20 division?

21 A Yes, sir.

22 Q Lieutenant Carter, I want to direct your attention
23 back to March the 19th of 2002 and ask if you were
24 working that particular day?

25 A Yes, I was.

1 Q In regard to this particular case did you have the
2 occasion to respond to an area of a burglary or
3 attempted burglary call?

4 A Yes, I did.

5 Q How did you go about doing that?

6 A I responded to the area of Hillcrest Cemetery when
7 I heard Lieutenant Bettis request back-up there.

8 Q Do you recall where you were when you first
9 received the call or heard that information?

10 A Somewhere on the Southside of Lanett.

11 Q Just your best judgment, how long would you say it
12 took before you arrived?

13 A Probably took me about three minutes.

14 Q Just describe for us what you observed when you
15 arrived at the scene.

16 A When I come into the cemetery I come over a rise
17 toward the back of the cemetery that goes down. I
18 saw Lieutenant Bettis' car behind I believe it was
19 a gray Mustang. I saw Sergeant Rick Brown's
20 vehicle parked on the side of the Mustang. And I
21 believe I saw another vehicle, possibly our animal
22 control officer's vehicle, parked further back
23 toward the hill from where I was coming in.

24 Q And for the members of the jury would you describe
25 the overall area out there where the vehicle was

VOL. 2 OF 2

Court of Criminal Appeals No. CR-03-1103
APPEAL TO ALABAMA COURT OF CRIMINAL APPEALS
FROM
CIRCUIT COURT OF CHAMBERS COUNTY, ALABAMA

Circuit Court Case Number: CC 2002-318
Circuit Judge: Honorable Ray Martin

Type of Conviction / Order Appealed From: State Conviction
Sentence Imposed: 40 years

Defendant Indigent: X YES NO

CHRISTOPHER MCCULLOUGH

KYLA KELIM

NAME OF APPELLANT

APPELLANT'S ATTORNEY

(TELEPHONE NO.)

Post Office Box 1977

ADDRESS

ALEXANDER CITY

ALABAMA

35010

CITY

STATE

ZIP CODE

V.

STATE OF ALABAMA

(State represented by Attorney General)

NAME OF APPELLEE

**NOTE: If municipal appeal, indicate above, and enter
Name and address of municipal attorney below.**

(For Court of Criminal Appeals use only)

1 stopped?

2 A It was at the back side of the open area adjacent
3 to a wooded area. There's a pulpwood road that
4 goes back into the woods on the furthest part of
5 the drive that you could be at.

6 Q Now, did you see any individuals that were at some
7 point identified to you as people that came from
8 the automobile?

9 A Yes.

10 Q Where were they?

11 A The driver was laying behind the Mustang in
12 handcuffs. And the passenger was outside the
13 passenger door laying on the ground handcuffed
14 also.

15 Q Would that have been Mr. McCullough and Mr.
16 Norris?

17 A Yes.

18 Q With regard to this after you received the call
19 and responded out to the area were you involved in
20 looking into this vehicle?

21 A Yes, I was.

22 Q Tell me what, if anything, you observed or
23 located.

24 A In the passenger front floorboard I observed a
25 blue bandanna, some brown work type gloves, roll

1 of duct tape, later on when I searched the vehicle
2 located two handguns hidden in a compartment
3 behind the back seat, between the back seat and
4 the trunk on the driver's side.

5 Q When you say handgun you're talking pistols; is
6 that correct?

7 A Yes.

8 Q Do you recall anything about what kind of pistols
9 they were?

10 A One of them was a revolver, I believe a .357. And
11 the other was a semi-automatic I think it was a 9
12 mm.

13 (State's Exhibit 5, envelope, marked for
14 identification.)

15 Q Show you what's mark as State's Exhibit Number 5.
16 And if you would Ms. Kelium has stipulated and we
17 placed it in that envelope. If you'd look at the
18 contents of that and see if you recognize the
19 items contained in it?

20 A Yes, sir.

21 Q What are those items, please?

22 A One pair of brown work gloves, one blue bandanna,
23 and one roll of duct tape.

24 Q Now, it looks like the bandanna was tied in some
25 manner; is that right?

1 A Yes.

2 Q Is that the way you found it?

3 A Yes, it is.

4 Q Those are the items that you recovered out of the
5 vehicle when you responded on March the 19th; is
6 that correct?

7 A Yes, sir.

8 MS. LISEBY: We would offer State's Exhibit
9 5 and its contents.

10 THE COURT: Admitted.

11 (State's Exhibit 5 admitted.)

12 Q With regard to this area out there and the vehicle
13 itself, Lieutenant Carter, was a videotape made by
14 the police?

15 A Yes, there was.

16 Q Have you had an opportunity to view that
17 videotape?

18 A Yes, I have.

19 Q Does it fairly and accurately depict or show the
20 area where the vehicle was stopped and the area
21 inside the vehicle?

22 A Yes, it does.

23 MS. KELIUM: Could I approach the bench?

24 THE COURT: Yes.

25 (The following occurred at the bench

1 outside the hearing of the jury.)

2 MS. KELIUM: I just want to get another
3 objection on the record to preserve my motion in
4 limini about our jumping up and down about my
5 client being viewed in handcuffs for the duration
6 of this video. It proves absolutely nothing.
7 They're not on the property. We offered to
8 stipulate to the fact they were stopped within 2
9 to 300 yards of the property. I have no objection
10 to stipulating that the guns were in the trunk of
11 the car that my client owned. I think no purpose
12 is served by this. Its probative value is nil.
13 Even if it had any minimum probative value, the
14 prejudicial effect far outweighs that. We've
15 provided the Court with some case law that would
16 cover that.

17 I know for a fact there's other out there,
18 and I just could not pull them all. You know,
19 with the case I have given the court of the
20 Eleventh Circuit says you're not even supposed to
21 see the defendant in handcuffs. The jury is not
22 supposed to see him in handcuffs at all.

23 THE COURT: In that case that defendant had
24 already been in jail, was charged, and was
25 subsequently removed from jail and carried out to

1 the scene. This is the actual scene of the
2 arrest.

3 MS. KELIUM: And it proves not the arrest.
4 There's nothing that's extremely prejudicial. The
5 fact of the arrest is extremely prejudicial. They
6 know he's arrested. They know he's been indicted.
7 But they don't need to see him laying on the
8 ground on his stomach in handcuffs.

9 THE COURT: All of this happened within a
10 matter of minutes as I understand the testimony,
11 back to back from the time they were at the house
12 to time they were actually arrested. This was a
13 very short span of time. Previously I've denied
14 the motion in limini. And it's again denied. You
15 have got your objection on the record.

16 MS. KELIUM: Can I have a continuing
17 objection through the tape?

18 THE COURT: Yes.

19 MR. LISENBY: While you're up here. If it's
20 all right with you, Judge, we'll show the
21 videotape. And we'll speed through portions of it
22 as Ms. Kelium has said. We're not going to do the
23 whole thing. Then after that if you could read
24 the stipulation.

25 THE COURT: I have got the stipulation ready

1 I believe. So move on with it.

2 (Jury Present)

3 BY MR. LISENBY:

4 Q Let me show you State's Exhibit Number 6 and tell
5 me if you recognize that as the videotape involved
6 in this case, please.

7 A Yes, sir.

8 Q That's the one that you indicated that you had
9 previously viewed; is that correct?

10 A That's correct.

11 MR. LISENBY: At this time we would offer
12 State's Exhibit Number 6.

13 THE COURT: Admitted.

14 (State's Exhibit 6, tape, admitted.)

15 MR. LISENBY: With the Court's permission we
16 would like to play it for the jury.

17 THE COURT: You may. Can everybody on the
18 jury see? Mr. Lisenby has placed this
19 television.

20 MR. LISENBY: If anyone thinks it would be
21 better to put it at an angle.

22 MR. LISENBY: Before you start playing it,
23 Ms. Kelium and I have discussed this. There may
24 be portions where we fast forward this tape.

25 THE COURT: Yes.

(VIDEOTAPE PLAYED)

THE COURT: Ladies and gentlemen, the State and the defendant with advice of counsel have stipulated, that means they have entered a stipulation or an agreement, that two pistols were recovered from the vehicle involved in this case. And they have agreed that those weapons do not need to be brought into court today. Based on this stipulation or agreement between the parties you, the jury, shall consider these weapons as evidence just as if they were presented here in open court today. You may proceed.

MR. LISENBY: Thank you, Your Honor.

BY MR. LISENBY:

Q Now, Lieutenant Carter, I want to ask you just a couple of things about the videotape. You were able to observe it; is that correct?

A Yes.

Q There was a shot by the camera with regard to the tires of the vehicle. What was that for?

A Showing the mud on the tires, to show the path through that muddy pulpwood road where Lieutenant Bettis saw it coming out from.

Q Is that area back in there, further back, would not be abutting the Gragg residence property?

1 A Yes.

2 Q Now, with regard to this particular case,
3 Lieutenant Carter, on March the 19th of 2002, did
4 you have the occasion to speak to the defendant
5 Chris McCullough?

6 A Yes, I did.

7 Q Prior to your speaking to him did you or anyone in
8 your presence threaten or coerce him?

9 A No.

10 Q Did you or anyone in your presence promise him
11 anything or offer him any hope of reward?

12 A No.

13 Q Did you or anyone in your presence tell him it
14 would be better for him to make a statement than
15 to not make a statement?

16 A No.

17 Q Did he then make a statement with regard to this
18 case?

19 A Yes, he did.

20 Q How was that taken down?

21 A In written form.

22 Q Who wrote it?

23 A I did.

24 MS. KELIUM: Can I approach, Your Honor?

25 (The following occurred at the bench

1 outside the hearing of the jury.)

2 MS. KELIUM: I just wanted to place my
3 objection on the record to the introduction or
4 admission of this statement. We've previously had
5 a hearing on. And the Court has ruled they're
6 going to allow it in, but give a jury instruction
7 giving the jury information on things that they
8 can take in account or we're stating that that's
9 not good enough and he wouldn't sign it. But
10 there's other evidence we presented that shows
11 it's not voluntary and not willingly waived his
12 rights at all and didn't voluntarily give them a
13 statement.

14 THE COURT: Objection overrule. Motion to
15 suppress has previously been denied. Go ahead.

16 (Jury Present)

17 BY MR. LISEBY:

18 Q I want to show you what has been previously marked
19 as State's Exhibit Number 2 and ask if you
20 recognize that?

21 A Yes, I do.

22 Q In regard to the Gragg residence events is that
23 the statement that you took from Mr. McCullough?

24 A Yes, it is.

25 Q I notice that there's some information at the top

1 that's filled in. There's I guess blank spaces;
2 is that correct?

3 A Yes.

4 Q Can you tell us what those are, please?

5 A It has the name Chris McCullough, address of 604
6 South First Avenue, Lanett, Alabama; and a phone
7 number of 586-1158; date, March 19th, '02; time of
8 statement 16:53 hours which is 4:53 eastern time;
9 and page one of one pages.

10 Q Why do you use eastern time?

11 A Because we work in the eastern time zone.

12 Q So Lanett is an eastern time zone in this county?

13 A Yes.

14 Q Now, this is not the original; is that correct?

15 A That's correct.

16 Q It is a copy with regard to the statement
17 involving Mr. Gragg's residence; is that right?

18 A That's right.

19 Q Any changes, marks, or alterations other than
20 State's Exhibit sticker from the statement
21 involving Mr. Gragg's residence?

22 A No, sir.

23 MR. LISEBY: Offer Number 2, Your Honor.

24 THE COURT: Admitted.

25 (State's Exhibit 2 admitted.)

1 Q If you would if you would read that to the jury,
2 please?

3 A Today I picked him up at my house. I had been to
4 Lafayette to the food stamp office. I was headed
5 back to Lafayette when we saw the house. We
6 stopped and parked down at the cemetery. When we
7 got out I had a mask and the 9 mm. Billy had a
8 bandanna and gloves. He left the duct tape in the
9 car. We went through woods to the house. When we
10 got to the house Billy saw a lady inside folding
11 clothes. He told me. And I said let's go. He
12 said you got a gun. You might as well go on and
13 do it. I told him no. Then we was walking back
14 towards the woods when we heard the police car
15 coming up. Then we ran through the woods to the
16 car.

17 Mr. McCullough read this statement and
18 advised it was true and correct but would not sign
19 it. And then I signed it.

20 Q Up there on the first sentence it says I picked
21 him up. Who is that in reference to?

22 A His co-defendant Billy Ralph Norris.

23 Q And you said that Mr. McCullough read this
24 statement; is that correct?

25 A Yes.

1 Q Did you ask him if that was correct?

2 A Yes, I did.

3 Q Did he acknowledge that it was, in fact, correct?

4 A He did.

5 Q Did you ask him to sign the statement?

6 A Yes, I did.

7 Q But he would not sign the statement?

8 A No, sir.

9 Q This residence involving Mike Gragg that's here in
10 Chambers County; is that correct?

11 A Yes, sir.

12 MR. LISEBY: At this time we would like to
13 publish to the jury State's Exhibits 2 and 5.

14 THE COURT: You may publish.

15 MR. LISEBY: I believe that's all the
16 questions I have. Ms. Kelium may have some for
17 you.

18 CROSS EXAMINATION

19 BY MS. KELIUM:

20 Q Were you present when Mr. McCullough was read his
21 rights before giving a statement?

22 A No, ma'am.

23 Q There were other officers present though?

24 A Yes, ma'am.

25 Q Throughout the incident, the fact State's exhibit

1 showing his waiver of rights there shows four
2 officers?

3 A During when he was Mirandized.

4 Q When he was Mirandized. You also questioned Billy
5 Norris about this offense, didn't you?

6 A Yes, ma'am.

7 Q You questioned Billy Norris first?

8 A Yes, ma'am.

9 Q So Billy Norris made a statement prior to the time
10 you spoke to Mr. McCullough; is that right?

11 A Yes, ma'am.

12 Q Is it fair to say that you were telling Mr.
13 McCullough quite a bit about what Mr. Norris was
14 saying before he gave a statement; is that right?

15 A Some of the things.

16 Q In fact, a lot of things would you agree that were
17 in Mr. McCullough's statement were in Mr. Norris'
18 statement? Wouldn't you agree with that?

19 A Yes, ma'am.

20 Q It took you about three minutes to arrive at the
21 scene where the car was; is that correct?

22 A Yes, ma'am.

23 Q Three minutes of the time the car was stopped or
24 three minutes at the time of the initial call?

25 A Three minutes of the time that Lieutenant Bettis

1 called for a back-up unit.

2 Q You were there about three minutes?

3 A Yes, ma'am.

4 Q I think we all saw the videotape. I know we fast
5 forwarded several portions. It took you quite a
6 while to locate guns?

7 A Yes, ma'am.

8 Q They were not located when you first walked up?

9 A No, ma'am.

10 Q In fact, there were a number of officers in the
11 video, right?

12 A Yes, ma'am.

13 Q Half a dozen?

14 A I don't know if there was six or more, but there
15 was only three at most doing the search.

16 Q But there was several of you in and around the
17 car? It was quite a while before those guns were
18 located?

19 A Yes, ma'am.

20 Q They were not in Mr. McCullough's waist band?

21 A No, ma'am.

22 Q Not the small of his back?

23 A No, ma'am.

24 Q Not in the pocket?

25 A No, ma'am.

1 Q Not in the boot?

2 A No.

3 Q Not down his shirt?

4 A No.

5 Q Where were they?

6 A They were behind the driver's seat in the back
7 passenger seat. The seat folds down and were put
8 right there behind the speaker box which the
9 opening goes to the trunk area.

10 Q That sounds quite complicated?

11 A It's not.

12 Q This wasn't just tossed into the floorboard?

13 A No, ma'am.

14 Q Do you recall the ski mask in his pocket? See
15 that on the video, right?

16 A Yes, ma'am.

17 Q It's not laying there on the floor when you walk
18 up. It's a two-door car, right?

19 A Yes, ma'am.

20 Q When you open the car door in the back, it wasn't
21 laying there where you could see it, right?

22 A Right.

23 Q When you pulled the back seat up, was it laying
24 there where you could see?

25 A Pull the back seat down.

1 Q Pull the back seat down?

2 A Yes.

3 Q Then there's a speaker box?

4 A Yes, ma'am.

5 Q It was behind that speaker box?

6 A No. If you let the back seat down, the back rest
7 portion, the guns were laying right there and the
8 speaker box is further back. So the guns were
9 between the back seat and the speaker box.

10 Q It's not anywhere where you could see it?

11 A Not through just plain view, no.

12 Q In fact, y'all were looking for about 20 minutes?
13 I think you said three of you were looking in
14 there before these were located; is that right?

15 A I'm not sure how long we searched.

16 Q You saw the videotape. If I said about 20 minutes
17 give or take a few would that seem about right?

18 A Probably reasonable.

19 MS. KELIUM: That's all the questions I have.

20 THE COURT: Anything further?

21 MR. LISEBY: No, Your Honor.

22 THE COURT: You may step down. Call your
23 next witness.

24 MR. LISEBY: State rests, Your Honor.

25 THE COURT: State rests. Ladies and

1 gentlemen, I'll need for y'all to step out to the
2 jury room for just a few minutes. I'll call you
3 back in.

4 (JURY NOT PRESENT)

5 THE COURT: The jury is now in the jury room.

6 MS. KELIUM: I have a motion to make. The
7 defense moves for a judgment of acquittal. The
8 State has failed to prove their case for attempted
9 burglary. They have to prove that Mr. McCullough
10 attempted to break into Mr. Gragg's home with the
11 intent to commit a crime therein.

12 The most they have been able to show credibly
13 is a charge of attempted or a charge of criminal
14 trespassing according to the testimony on the
15 property. That does not a Class B felony make.
16 The State has the burden. The State has fail to
17 meet their burden. They have a statement that's
18 unsigned from my client regarding a gun. They
19 have Billy Norris a convicted liar talking about a
20 gun. No one else there was able to see a gun.
21 The had the gun located in a portion of the car
22 that they're in that's so hard to get to, it's not
23 credible to have that excluded every possibility
24 of innocence in this case except for a charge of
25 criminal trespass.

1 THE COURT: What says the State?

2 MR. LISEBY: Judge, this is about the
3 clearest case I think I have ever seen as far as
4 the evidence involving what took place. We have a
5 confession from the defendant saying that they
6 were going to go into the house, was armed with a
7 gun, and a mask on, the mask still in his back
8 pocket when the police got to him, guns in the
9 car.

10 The individual that was with him Mr. Norris
11 indicated that they went there with intent to
12 steal items. They were searching around for a
13 place to get into it. They just happened to see
14 somebody there. If this isn't an attempted
15 burglary in the first degree I'm afraid people in
16 this society have no way of ever being able to
17 defend themselves other than getting out and start
18 shooting people that are crouching around their
19 house with masks on.

20 THE COURT: Motion for judgment of acquittal
21 denied.

22 How long do you think your case will be?

23 MS. KELIUM: About 15 or 20 minutes. I
24 wanted to take a short break. I need a personal
25 break. And I need a break to talk to my client

1 for a few minutes.

2 THE COURT: Let's take that break.

3 (BREAK)

4 MS. KELIUM: My client is going to testify.

5 MR. LISENBY: Being that I would like to go
6 ahead and ask the Court to -- previous discussion
7 about the prior convictions.

8 THE COURT: What are the convictions for?

9 MR. LISENBY: Receiving stolen property
10 second degree in '93, burglary first degree in
11 November of '02 and theft of property second
12 degree in November of '02.

13 MS. KELIUM: I have two separate issues. The
14 first one is going to be the '93 conviction is 10
15 years old for the receiving. The second is that
16 the burglary was one of these series of events
17 which he was charged right after he was arrested
18 for this event.

19 MS. LISENBY: Actually the '93 case was
20 November 22nd, 1993. Today is November 13th,
21 1993. It's not yet 10 years old.

22 MS. KELIUM: It's real close though. I think
23 the Judge has the discretion not admit it when
24 it's that close.

25 THE COURT: It's admissible now. What's the

1 other one?

2 MS. KELIUM: The other burglary is one of
3 these series that he was arrested for all at the
4 same time. The State is trying them one at a
5 time.

6 THE COURT: Was he convicted by a jury?

7 MR. LISENBY: Yes, sir.

8 THE COURT: Sentenced?

9 MR. LISENBY: Yes, sir.

10 THE COURT: It's admissible.

11 MS. KELIUM: It's still on appeal, too. It's
12 not final.

13 MR. LISENBY: That's an issue that can be
14 brought up on redirect examination according to
15 McElroy's.

16 THE COURT: I think that's the proper way to
17 do it. You can -- it is a conviction. It is on
18 appeal. Let's look at McElroy. But I believe
19 that's the procedure to be followed. Because it's
20 on appeal I don't think prohibits its use in
21 impeachment.

22 MR. LISENBY: That might even be in the rule
23 of evidence.

24 THE COURT: Let's look at that.

25 MR. LISENBY: Yes, sir. Rule 609E, pendency

1 of appeal. The pendency of an appeal therefrom
2 does not render evidence of a conviction
3 inadmissible. Evidence of the pendency of an
4 appeal is admissible.

5 THE COURT: So you can use it. And you can
6 state that it's still on appeal. All right.
7 After this then we'll send the jury back out.
8 He's your witness.

9 MS. KELIUM: Burglary first and theft second
10 in that case, right?

11 MR. LISEBY: These are our requested
12 charges.

13 THE COURT: Let me be looking over those.
14 Okay. All right.

15 (JURY PRESENT)

16 THE COURT: Okay. At this point the State
17 has rested. And the defense may proceed.

18 MS. KELIUM: Thank you. Defense calls Chris
19 McCullough.

20 CHRISTOPHER MCCULLOUGH
21 called as a witness in his own behalf, having been
22 first duly sworn, was examined and testified as
23 follows:

24 DIRECT EXAMINATION

25 BY MS. KELIUM:

1 Q Can you state your name for the record?

2 A Christopher Keneshia McCullough.

3 Q Chris, you're from the Valley area; is that right?

4 A Yes, ma'am.

5 Q That's where you grew up?

6 A Yes, ma'am.

7 Q Your family all lives in Valley?

8 A Yes, ma'am.

9 Q I'm going to draw your attention to March 19th,
10 2002. You have been sitting here through the
11 trial and have heard a lot of testimony about that
12 date. Can you tell the jury what you did on that
13 date starting in the morning?

14 A I got up around about 8:00, took my girlfriend to
15 the Department of Human Resources up here in
16 Lafayette.

17 Q And took her there for a food stamp interview?

18 A Yes, she had a food stamp interview.

19 Q What did you do after you left there?

20 A I left there. Me and Billy Norris had talked like
21 on a Saturday night about some activity that he
22 wanted to do. But more like he wanted to be a
23 member of a gang really what it was.

24 Q Then what happened?

25 A We talked. And he told me he wanted me to do some

1 gang. He said what do you want to do. So I
2 picked him up at Kroger. Like he said I picked
3 him up. I said what you going do to the gang. He
4 said I know somebody by the cemetery. So I took
5 him to the cemetery.

6 Q Which cemetery did you take him to?

7 A They said name of it is Hillcrest.

8 Q Once you got there what happened?

9 A Got out the car, went through the woods. I
10 stopped in the edge of the woods right there.
11 Billy went around and looked in the window, looked
12 around the house and looked in the window. He
13 seen an old black lady folding up clothes. She
14 had a yellow blouse on. He came back and told me.
15 He said a black woman in there folding clothes. I
16 said who she is. He said I don't know. I said
17 okay, just go. He said, no, want to do something
18 gangster. He had duck tape that he stole that
19 from Kroger.

20 Q Then what happened?

21 A Billy Norris had a bandanna around his face. He
22 seen the woman from the back side. He went around
23 the front side of the house. So we went around
24 the front side. He tells me he still going to
25 kick the door in. The honest God's truth, he told

1 me he was going to kick the door in. I asked him
2 what he going to do. He said it's gangster. If I
3 do enough gangster if I kick the door. I said put
4 on death row. I talked him out of it. Only part
5 I talked him out of it. I told him no.

6 Q Then what did you do?

7 A Well, by me having influenced him not to do it he
8 said the woman (inaudible). I said she probably
9 see you, too. I going to do this. I said, man,
10 police coming. I bribe him. I bet you 15 minutes
11 the police coming. Let's see. Went back to the
12 edge of the woods and laid down. Before we know
13 it here a car come up the driveway. We got up and
14 ran back through the woods.

15 Q When you were on this property did you have a gun
16 with you?

17 A No.

18 Q Did you have a gun in the car?

19 A They said I had a gun in the car. I didn't have
20 no knowledge of no gun in no car. I didn't put it
21 in there.

22 Q You heard Billy Norris say that you had the gun in
23 your waist band?

24 A What he said.

25 Q Did you have a gun in your waist band?

1 A No, ma'am.

2 Q What were you intending to do at that house?

3 A I observed him do something foolish.

4 Q What?

5 A I said I was really there. I observed him doing
6 some foolish, stupid, really say for real.

7 Q So then you turned around and you left?

8 A Yes, ma'am.

9 Q What happened after that?

10 A In the process me leaving the cemetery make like a
11 U-shape like a car parked like this. Process of
12 me leaving I seen a police car on top of the hill.
13 I seen the police officer. I immediately stopped
14 my vehicle. And there was Lieutenant Bettis
15 pulled about two feet behind me. When he did that
16 he made us get out of the car, drew the pistol,
17 told us to get out the car.

18 Q That happened right after you were leaving their
19 property?

20 A Yes, ma'am.

21 Q Chris, you have been in trouble before; is that
22 right?

23 A Back in 1993.

24 Q And you're the same Christopher McCullough that
25 was convicted of receiving stolen property in the

1 second degree in 1993; is that correct?

2 A Yes, ma'am.

3 Q You're also the same Christopher McCullough that
4 was convicted of burglary first and theft of
5 property second last year; is that correct?

6 A Yes, ma'am.

7 Q Is that case still on appeal now?

8 A It's in the Alabama Supreme Court.

9 Q So the conviction is not final in that case?

10 A No, ma'am.

11 Q You heard the testimony today from Billy Norris
12 that you had this gun with you?

13 A Yes.

14 Q That it was your idea to go to this house and your
15 car and your gun and you wanted to stay there?

16 A No, that's wrong. By me traveling on that road
17 going to Lafayette I mean impossible to see
18 people's house on that road. It's impossible.

19 Q So you're saying that Billy is lying?

20 A Yes, ma'am.

21 Q And you had also said you heard the testimony of
22 Lieutenant Carter and you have seen the statement
23 that they say you gave. Did you give Lieutenant
24 Carter that statement?

25 A No. It wasn't a statement, nothing like a

1 statement. It was a verbal conversation between
2 me and Mr. Carter about what happened. But
3 everything I told him we conversated about he
4 switched around.

5 Q Did he have you write something down?

6 A No, ma'am.

7 Q Write any notes for him?

8 A No.

9 Q He wrote everything, didn't he?

10 A He wrote everything and telling me what Billy
11 Norris said.

12 Q Then did he give you an opportunity to look at
13 that statement?

14 A Yes.

15 Q Did you note on the statement where it stated that
16 you said it was true and correct?

17 A What he said.

18 Q Is that true?

19 A I read he said it. After I read it, I refused to
20 sign it.

21 Q Why did you refuse to sign it?

22 A It wasn't statutory of my rights. It wasn't true.

23 Q It wasn't true?

24 A No, ma'am.

25 MS. KELIUM: That's all the questions I have

1 right now. Mr. Lisenby is going to have some
2 questions for you. Answer his questions.

3 THE COURT: Cross examination.

4 MS. LISEBY: Thank you, Your Honor.

5 CROSS EXAMINATION

6 BY MR. LISEBY:

7 Q Mr. McCullough, you indicated to Ms. Kelium that
8 you had been to Lafayette earlier that day; is
9 that correct?

10 A Yes, sir.

11 Q And you had actually been there to take your
12 girlfriend to the Department of Human Resources
13 for a food stamp interview; is that right?

14 A Yes, sir.

15 Q You heard Mr. Norris indicate that you had been to
16 Lafayette and that you had taken your girlfriend
17 for a food stamp interview; is that right?

18 A He said I was on the way back to Lafayette to pick
19 her up. What he stated.

20 Q So you didn't hear him say that you had been to
21 Lafayette?

22 A Yes.

23 Q So he did say that?

24 A Yes.

25 Q That you had carried your girlfriend or something

1 with regard to food stamps?

2 A Yes, sir.

3 Q You indicated to Ms. Kelium that you and Mr.
4 Norris had talked on Saturday night?

5 A Yes, at a club called Soul Inn in Tuskegee.

6 Q This would have been March 19th I believe was a
7 Tuesday; is that correct?

8 A A Monday.

9 Q Sorry?

10 A A Monday.

11 Q You think it's a Monday. When you had this
12 conversation with Mr. Norris you said that he was
13 talking about activity he wanted to do?

14 A Yeah, he wanted to be a gang member.

15 Q Wanted to be a gang member. Are you a gang
16 member?

17 A No.

18 Q You're not?

19 A No.

20 Q Well, in order to get in a gang don't you have to
21 have a gang member observe you do something?

22 A I know a lot of gangs down in Montgomery. We go
23 to the club, we kick it, right. They said that
24 Billy said he wanted to be done with them. He
25 asked me what was a good start.

1 Q My question is isn't it true that in order to be a
2 gang member you have to have a gang member observe
3 you do something?

4 A Not necessarily.

5 Q You can just tell them you've done it?

6 A No. They can beat you down. You can't tell them
7 nothing. They jump on you.

8 Q You indicated it was true what Mr. Norris said
9 that you picked him up at Kroger?

10 A That's true.

11 Q You don't live in Lafayette?

12 A No.

13 Q He didn't live in Lafayette, did he?

14 A No.

15 Q He went back up/down, however you want to describe
16 it, Country Club Road back towards the residence
17 of Mr. Gragg; is that correct?

18 A We went to the cemetery.

19 Q Went to the cemetery. That's back up toward the
20 area where Mr. Gragg's residence is, isn't it?

21 A You can say that.

22 Q You said that you were driving the car?

23 A My Mustang.

24 Q Your Mustang?

25 A Yes.

1 Q Mr. Norris had not been in your Mustang earlier in
2 the day?

3 A No.

4 Q Till you picked him up at Kroger?

5 A Yes.

6 Q Your testimony and questions by Ms. Kelium was you
7 didn't know there were guns in the car?

8 A Ugh-uh.

9 Q Mr. Norris didn't put them in there though, did
10 he?

11 A No that I know of.

12 Q You don't know how it got there?

13 A I keep a crowd full of people in my house and in
14 my car every weekend.

15 Q You just don't know how those guns got in your
16 car?

17 A No.

18 Q You said when you got into the cemetery that he
19 got out of the car. Did you get out of the car,
20 too?

21 A I said I did.

22 Q You both got out of the car?

23 A Yes.

24 Q You went where?

25 A Went through the woods. He went to the man's

1 premises.

2 Q So your testimony is you stopped at the woods at
3 the wood line?

4 A Whatever you call it. I don't know what they call
5 it.

6 Q Is that what you're talking about where the woods
7 stopped you stopped?

8 A Yes.

9 Q What distance would you say that was from the
10 house?

11 A About a hundred feet.

12 Q Longer than this room or shorter than this room?

13 A Little longer.

14 Q Little longer than this. It's your testimony that
15 you and Mr. Norris had a conversation back and
16 forth from that distance?

17 A No.

18 Q No?

19 A No.

20 Q Well, you said something about that he went up to
21 the house and said that there was an old black
22 woman -- came back to you and said there was an
23 old black woman folding clothes?

24 A Yes.

25 Q You told him let's go, he said he was going to do

1 something gangster?

2 A That's what he said.

3 Q The next thing you said is that he was back up at
4 the house talking about he was going to kick the
5 door down?

6 A He was.

7 Q Means you must have been at the house?

8 A I had to stop him.

9 Q I'm sorry.

10 A I had to stop him.

11 Q You had to stop him?

12 A Yeah.

13 Q You were there to stop him now; is that correct?

14 A When any time you see a situation get out of hand
15 somebody has got to step up and stop something,
16 getting out of hand.

17 Q You told Ms. Kelium the reason that you were there
18 is that you were going to observe Norris do
19 something foolish?

20 A Super foolish, going in that house while that
21 woman in there. That's beyond foolish. That's
22 stupidity.

23 Q But you were there watching him do something
24 foolish. Now, you're telling me that you were
25 there to stop him?

1 A Foolish if he was going to break in the house
2 somebody there, hurt somebody that's nonsense.

3 Q Your testimony is you did go up to the house?

4 A I had to go stop him one time.

5 Q You did go up to the house?

6 A Yeah. I didn't have no intention breaking in
7 nothing.

8 Q When you went to the house you had a mask on,
9 didn't you?

10 A Yes.

11 Q Because Ms. Trammell saw you with a mask on,
12 didn't she?

13 A Didn't nobody see me with no mask on. It's
14 impossible. When I was there I was on the ground.
15 I'm not no fool, seeing in the yard with no ski
16 mask on.

17 Q I just want to be clear now. You're having to
18 wear a mask to go up to a house because you're
19 going to try to stop him from doing something
20 foolish? Is that what you're telling us?

21 A I didn't want anybody to see my face.

22 Q Didn't want anybody to see your face?

23 A No.

24 Q That might indicate you were involved?

25 A Not necessarily that. I wasn't no fool.

1 Q Now, your testimony was that Mr. Norris made some
2 comment about I'm going to kick the door in. I
3 think you said he went around to the front?

4 A God as my witness if I hadn't stopped that fool,
5 he would have kicked that man's door in. He was
6 fixing to do it.

7 Q So you talked him out of doing it? Is that your
8 testimony?

9 A Yes.

10 Q I believe the next thing you said that happened
11 was that you said the police are probably going to
12 be here in about 15 minutes; is that right?

13 A It's common sense. He's about your height. He
14 standing looking in the window. He said the lady
15 back toward him one time. Then he said the lady
16 seen him. Evidently something ain't right.

17 Q So you said let's just watch and see if the police
18 get here?

19 A No. I told him police coming.

20 Q They thought you said that y'all laid in the woods
21 and watched?

22 A We did.

23 Q So you told him the police are coming. Then y'all
24 went back to the woods and laid down and watched
25 for the police to come?

1 A He didn't believe me.

2 Q You had to convince him?

3 A That's right.

4 Q Are you still wearing the mask?

5 A I didn't have the mask on then.

6 Q You had already put it in your back pocket then?

7 A That's right.

8 Q In fact, when the police got there you had a mask
9 in your back pocket?

10 A Yes.

11 Q That's this mask right here that's marked State's
12 Exhibit Number 4?

13 A I don't know that exact mask, but --

14 Q Take a look at it.

15 A I can't remember that mask. Last time I seen it
16 put it in my back pocket. The police car I stuck
17 it up under the seat.

18 Q Even though Ms. Trammell says that you had on a
19 dark mask, ski mask like this, you don't remember
20 if you had this kind of mask on?

21 A I know the ski mask was blue.

22 Q Now, you indicated to Ms. Kelium that Mr. Norris
23 had a bandanna on his face?

24 A Yes.

25 Q Is that right? I believe that's when you made the

1 comment that's the only part of the statement that
2 Lieutenant Carter got right?

3 A No, I didn't.

4 Q Didn't say that?

5 A I don't think I said that though. I said he had
6 it right when I told him I talked him out of it if
7 I ain't mistaken.

8 Q When Lieutenant Carter wrote down I had been to
9 Lafayette at the food stamp office that was
10 correct, wasn't it?

11 A He got all that from Billy Norris. He had talked
12 to Billy Norris about two or three hours before
13 they talked to me. He already knew. Everything I
14 had told Billy he already knew.

15 Q So you didn't tell Lieutenant Carter that?

16 A No. We stopped and parked down at the cemetery.

17 Q He didn't get that from you either?

18 A No.

19 Q We got out. I had a mask and a 9 mm?

20 A I didn't tell him I had no 9 mm.

21 Q Did you tell him you had a mask?

22 A No. He didn't see me with a mask.

23 Q You didn't tell him that either?

24 A No, I ain't that stupid.

25 Q You only had a bandanna?

1 A Billy told him that.

2 Q You didn't tell him it was in the car?

3 A No.

4 Q We went through the woods to the house, didn't
5 tell Lieutenant Carter that?

6 A I ain't told Carter nothing.

7 Q You told us earlier that you and he were having a
8 conversation?

9 A Conversation, I told him -- everything I said he
10 switched around. Why I tell this man I was fixing
11 to commit a crime. I had a ski mask, I got a
12 pistol.

13 Q What I'm trying to figure out is you said you and
14 Lieutenant Carter had a conversation about what
15 took place?

16 A He was telling me what Billy Norris had said. I
17 told him I ain't telling him.

18 Q Let me ask it this way. Did you or did you not
19 say earlier today when you were testifying that
20 you and Lieutenant Carter were having a
21 conversation about what took place?

22 A That's it, a conversation.

23 Q Those things that I was just reading to you you
24 never told Lieutenant Carter, is that what you're
25 telling us?

1 A Ugh-uh, not for no statement.

2 Q When we got to the house Billy saw a lady inside
3 folding clothes, didn't tell him that either?

4 A He told all that. Anything on that statement he
5 already knew before they asked me two hours later.

6 Q We was walking back towards the woods when we
7 heard the police car coming, ran through woods to
8 car, didn't tell Lieutenant Carter that either?

9 A No.

10 Q So this conversation that you're saying that you
11 had with Lieutenant Carter has absolutely nothing
12 to do with what's written down on this statement?
13 Is what you're telling me?

14 A If I had told him I would have signed it.

15 Q What I'm asking is are you telling us that nothing
16 that's in this statement --

17 A All I said --

18 Q Let me finish. Are you telling us that what is in
19 this statement is nothing about what you and
20 Lieutenant Carter talked about?

21 A Yes. It's something was said Billy said -- I said
22 Billy wrong. Billy said this, Billy wrong. Why
23 I'm going to tell him. I'm ex-con. Why I'm going
24 to tell him I had a 9 mm, and they charge me for
25 convicted felon.

1 Q Well, are those things that were in the statement
2 what you were telling him that Billy Norris said
3 were wrong? I'll ask it that way.

4 A I told him no.

5 Q I'm sorry?

6 A I told him no.

7 Q You told him no?

8 A That wasn't right.

9 Q So you're saying that what you testified to
10 earlier today is not correct then? That you had
11 gone to Lafayette, that you had been to the food
12 stamp office, that you had picked up Billy Norris,
13 that you had driven him to the cemetery, that you
14 had gotten out of the car, that y'all had gone
15 through the woods, that you had a mask, that you
16 had been up to the house, Billy saw a woman in the
17 window, that after that there was a conversation
18 between you and Billy, that y'all went back to the
19 car and the police stopped you? None of that that
20 you have testified to is correct? Is that what
21 you're telling us?

22 A I didn't say that.

23 Q Isn't that what's in the statement?

24 A It don't matter what's in that statement. I know
25 what me and him said face to face. That's what

1 counts.

2 Q Did you lay in the woods and watch and wait for
3 the police?

4 A I said yes.

5 Q So even though you have now -- at that point, you
6 have been up to a house where you say Billy Norris
7 was going to kick the door in, you're wearing a
8 mask, you have told him the police are going to be
9 coming, you just going to lay and watch and wait
10 for the police? Isn't that what you're telling
11 us?

12 A Any time --

13 Q Yes or no. Is that what you're telling us?

14 A Yes.

15 Q All right. And the conviction in 1993 you said
16 was for receiving stolen property?

17 A Yes.

18 Q Five year sentence for that?

19 A Yes.

20 Q Burglary first degree 2002, November of 2002; is
21 that correct?

22 A Yes.

23 Q Got a 15 year sentence for that?

24 A Yes.

25 Q And a theft of property second degree in 2002,

1 November of 2002, a 10 year sentence for that?

2 A Yes.

3 MS. LISEBY: No further questions.

4 MS. KELIUM: I don't have any other
5 questions.

6 THE COURT: Hold on for just a second.

7 BY THE COURT:

8 Q Mr. McCullough, did you ever go up to this house?

9 A I went up there to talk him out of it. I admit I
10 told him that. I'm going to be straight up with
11 y'all, straightforward.

12 Q It's your testimony that the only time you went to
13 the house was with the purpose of having him stop
14 what he's doing?

15 A Yes, sir.

16 Q Did you ever other than that one time get out of
17 this wood line? Did you ever get out of the woods
18 other than when you went up to the house to get
19 him to come back?

20 A No, sir, and other than go back to my car.

21 Q So the only time you approached that house from
22 the woods --

23 A He walked up to the front door and kick it in and
24 I told him he done went crazy.

25 Q At any time after you left that car did you have a

1 pistol?

2 A No, sir.

3 Q Did Billy have a pistol?

4 A Not that I know of. They had stopped my car
5 for -- reason they searched my car by saying they
6 seen Billy with a pistol. Their own purpose of
7 stopping my vehicle. I come back around and none
8 of that happened.

9 Q You were there with Billy?

10 A Yes.

11 Q When he approached that house did he have a
12 pistol?

13 A No, sir.

14 Q He did not?

15 A I didn't see one.

16 THE COURT: Anything further from the State
17 or defense?

18 MS. KELIUM: No, Your Honor.

19 MR. LISENBY: No, Your Honor.

20 THE COURT: You may step down. Call your
21 next witness.

22 MS. KELIUM: Defense rests.

23 THE COURT: Defense rests. Ladies and
24 gentlemen, I'll need for y'all to once again step
25 back to the jury room. And I'll call you back out

1 in a few minutes.

2 (Jury not present)

3 THE COURT: The jury is now in the jury room.
4 Any motion?

5 MS. KELIUM: Your Honor, the defendant renews
6 his motion for judgment of acquittal. Again the
7 State has not born their burden of proof in this
8 case with several elements. They had to prove
9 that the defendant attempted to break and enter
10 into Mr. Gragg's home with intent to commit a
11 crime therein while armed. They haven't done
12 that. The burden is higher at this point. The
13 Court has to review it under a higher burden.
14 They have not met it. They have not excluded
15 every reasonable hypothesis except that leading to
16 the defendant's guilt.

17 THE COURT: Motion denied. Now, let's talk
18 about charges.

19 What's requested by the defense as far as the
20 charge itself? Charge is attempted burglary first
21 degree.

22 MS. KELIUM: That's correct. We've also
23 requested attempted burglary third degree and
24 attempted criminal trespass first and criminal
25 trespass second. I think I put all those in. If

1 I didn't that's what I want.

2 THE COURT: What says the State?

3 MR. LISEBY: I don't think attempted
4 burglary third would apply because we're talking
5 about an occupied dwelling. If it's anything it
6 would be attempted burglary second degree.

7 MS. KELIUM: Second was a building and third
8 was anything without a gun.

9 MR. LISEBY: Second was an occupied
10 dwelling.

11 MS. KELIUM: I don't think so.

12 MS. LISEBY: Part B. You have to read Part
13 B, 13a-7-6B.

14 THE COURT: Dwelling house.

15 MR. LISEBY: I think the testimony is
16 undisputed this is a dwelling. So I don't think
17 attempted burglary third would be correct.
18 Attempted burglary second wasn't requested. I
19 don't think either one of those two apply.

20 THE COURT: Okay. I don't think attempted
21 burglary third degree applies.

22 MS. KELIUM: 13A, we either request burglary
23 second, 13A-7-6B.

24 THE COURT: I'll hold on that one.

25 MS. KELIUM: I think the testimony is clear

1 he's saying that he didn't have a gun. Nobody at
2 the house saw him with a gun.

3 THE COURT: That's why I'm saying I'm holding
4 on that one.

5 MR. LISEBY: As far as other two attempted
6 criminal trespass first degree that would be the
7 attempt to get into the dwelling. There's been no
8 testimony at all from Mr. McCullough that he was
9 trying to get into the dwelling at all. The only
10 testimony produced by the State is the only
11 purpose for going into the dwelling would be to
12 commit a theft which would take it out of the
13 trespass statute and make it only a burglary. So
14 I don't think attempted trespass first would
15 apply.

16 MS. KELIUM: I think the case law is pretty
17 clear the criminal trespass in the first is a
18 lesser included of the burglary first if the State
19 has not proven what the attempt was.

20 THE COURT: But this is an attempt.

21 MS. KELIUM: That's why we requested an
22 attempted.

23 MR. LISEBY: Top of that he specifically
24 testified during his testimony that he wasn't
25 trying to get into the house. So there's no

1 evidence before the court either by the State or
2 the defendant that he was trying to get in the
3 house for any purpose other than to commit a theft
4 therein. That takes it out of the criminal
5 trespass.

6 THE COURT: His testimony is that -- there's
7 no testimony from him stating that he was trying
8 to get in the house period. It would be contrary
9 to his testimony. The only thing shown by the
10 State would be the intent to commit a crime
11 therein of theft.

12 MS. KELIUM: If the jury believes that
13 testimony.

14 THE COURT: But what I'm saying even if they
15 don't there's no evidence to show that he was
16 trying to simply get into the house.

17 MS. KELIUM: I think we're entitled to the
18 instruction even if it's weak, even if it is
19 advisable.

20 THE COURT: But not when there's no basis.
21 I'm saying I don't think there's any basis in the
22 evidence for that charge of attempted criminal
23 trespass in the first degree. The only evidence
24 presented is that presented by the State of him
25 attempting to enter the dwelling and was that

1 specifically to commit a crime therein being the
2 theft.

3 MS. KELIUM: I just think it's arguable. I
4 mean he walked up to the property line. And
5 trespass on the property was his own testimony.

6 THE COURT: Well, his testimony is the only
7 reason he ever left that tree line was to stop his
8 co-defendant from doing what he was doing. And
9 that would not be a trespass. I specifically
10 asked him that question.

11 MS. KELIUM: Not a trespass in the first
12 degree.

13 THE COURT: Not a trespass at all, not for an
14 illegal purpose.

15 MR. LISEBY: I agree with what the Court
16 said.

17 MS. KELIUM: We'd say clearly criminal
18 trespass in the second degree applies. His own
19 testimony, based on Mike Gragg's testimony that
20 his property was posted. He knows he was on the
21 property. He said he was trespassing on the
22 property.

23 THE COURT: His testimony is that the only
24 reason he entered was to prevent his co-defendant
25 from doing what he was doing.

1 MS. KELIUM: But under 13A-7-3 criminal
2 trespass in the second he doesn't need to have an
3 evil intent. He just has to be trespassing.

4 MS. NEWSOME: To enter or remain unlawfully.
5 If the only reason he's going on the property is
6 to prevent a felony from occurring that would be --

7 THE COURT: Exactly what I'm saying. His
8 testimony is that he was trying to prevent the
9 commission of a felony. And I don't see how that
10 can be construed as an unlawful entry for the
11 purpose of giving that charge.

12 MS. KELIUM: I think at some point he says he
13 wanted to go stop him. I think he also said he
14 went up there to the tree line with him and he was
15 going to watch him do something dumb, but ran up
16 there to stop him when he said there was somebody
17 in the house.

18 THE COURT: I specifically asked him about
19 leaving the tree line and entering onto the open
20 area before the house. And he said the only time
21 he did that was to basically stop his co-defendant
22 and then he left.

23 MS. KELIUM: I'd love to have that defense
24 available when it's true. If I could have that
25 and know my clients wouldn't get convicted of

1 criminal trespass. But that's not the case, Your
2 Honor. That's not what happens when they get
3 charged with criminal trespass. Were you on the
4 property? Was it your property? Were you
5 supposed to be there? Was it posted? No, boom.

6 MS. NEWSOME: One of the elements of unlawful
7 entry.

8 MS. KELIUM: If it's posted, already said the
9 property was posted.

10 THE COURT: After you've engaged in a
11 criminal plan, conspiracy, or whatever I think
12 that the law imposes a duty on you to not just
13 walk away, but to prevent that.

14 MS. KELIUM: That's his testimony that he
15 did. I guess that kind of goes to the end.

16 THE COURT: That's what I'm saying. His
17 testimony is that the only entry on these premises
18 was to stop the commission of the offense by his
19 co-defendant. That's his testimony. The State's
20 testimony is basically that they were armed, that
21 the intent was to break into this dwelling that
22 they knew to be occupied. I don't think any of
23 the lesser included charges apply save with the
24 exception of the burglary second. And for the
25 record that's based on the actual testimony and

1 evidence presented and looking at both the State's
2 evidence and defense evidence.

3 MS. KELIUM: Just like our exceptions noted
4 on those.

5 THE COURT: Okay. We've got that much.

6 MS. KELIUM: Abandonment.

7 THE COURT: I will charge on abandonment
8 either through your charge or the pattern jury
9 instruction.

10 MS. KELIUM: What I used I quoted out of this
11 case.

12 MR. LISEBY: Where are we looking at?

13 MS. KELIUM: First charge.

14 MR. LISEBY: I haven't had a chance to read
15 these.

16 MS. KELIUM: This is verbatim out of the case
17 Young v State 1998. Sodomy to burglary.

18 MS. NEWSOME: I think there's a grammatical
19 error in the first sentence.

20 THE COURT: It's not liable of.

21 MS. NEWSOME: Applies to that to someone who
22 attempts a crime.

23 MS. KELIUM: There is, sorry.

24 MR. LISEBY: I sure hope the pattern jury
25 charge is a lot clearer because I have read this

1 and it doesn't make a bit of sense to me.

2 MS. KELIUM: Parts of it I would like to take
3 out, but I figured you guys would jump and down
4 and scream.

5 MR. LISENBY: This charge was taken verbatim
6 with the exception of the nature of the charge and
7 what appears to be a typographical error rendering
8 a portion of it unreadable.

9 MS. KELIUM: Quite frankly I would welcome a
10 clearer one. Just quoting the statute.

11 MR. LISENBY: I think to have that out of the
12 statute. I can at least understand that.

13 MS. KELIUM: Tracks the statute.

14 THE COURT: I'll give that out of the
15 statute.

16 MS. KELIUM: We requested an instruction
17 number five of bias.

18 THE COURT: I have got a good one on that.

19 MS. KELIUM: Refusing that, but giving the
20 one in the book.

21 THE COURT: On the first one, number two,
22 attempted burglary third degree refused.

23 MS. KELIUM: I would just say if you could
24 fill in attempted second degree because that's
25 what you said you were giving instead of third

1 that's fine. We amend our request just to make
2 the record clearer. Actually did an order on
3 this.

4 THE COURT: So I'm going to read burglary
5 second that paragraph.

6 In determining what the true facts are from
7 the evidence you may take into consideration any
8 natural interest or bias a witness may have as a
9 result of any connection with the case. You make
10 take into consideration the interest or bias a
11 witness may have shown while testifying. You make
12 take into consideration the demeanor of any
13 witness as to whether that witness has apparently
14 testified frankly or evasively. You may take into
15 consideration any matter which you in your
16 everyday affairs in passing upon the truthfulness
17 and accuracy of the testimony weigh the testimony
18 in light of your common observation and experience
19 and reach a verdict that would be based upon the
20 truth as you determine it to be from all of the
21 evidence and the law as I charge you.

22 As to the burden of proof and the way it fits
23 into that I would charge a reasonable doubt is
24 doubt of a fair-minded juror honestly seeking the
25 truth after careful and impartial consideration of

1 all evidence in the case. It does not mean a fair
2 or arbitrary notion, but it is an actual doubt
3 based upon the evidence, lack of evidence,
4 conflict in evidence or any combination thereof.

5 If after considering all of the evidence you
6 are convinced of the defendant's guilt beyond a
7 reasonable doubt, then it would be your duty to
8 convict the defendant. However, if you still have
9 a reasonable doubt, the defendant is entitled the
10 benefit of that doubt. And the defendant should
11 be acquitted. And I think that says the same
12 thing that you do in five. Okay. It's from the
13 statute.

14 Now, State has Requested Charges One, aiding
15 and abetting, two aiding and abetting, three
16 aiding and abetting, four attempt.

17 Charge number one is basically the Code.

18 MR. LISENBY: Yes, sir.

19 THE COURT: Two.

20 MS. KELIUM: My question is was he charged as
21 an aider or abettor. I don't think he was. He
22 was charged as a principal.

23 MR. LISENBY: Both the same.

24 MS. KELIUM: He was never indicted as an
25 aiding and abetting.

1 THE COURT: Not indicted as an aider or
2 abettor. One and two are both correct.

3 Now, no particular act or acts are necessary
4 on the part of the defendant.

5 MS. KELIUM: That's not true.

6 THE COURT: I'm going to refuse three, grant
7 one and two. What is last?

8 MS. KELIUM: That's really thick, Your Honor,
9 and misleading.

10 THE COURT: What does Harris say? On this
11 kind of offense there's preparation and that's one
12 thing. You get the glass jug, you got some gas,
13 you got a rag, you got some matches. Next you put
14 it all together. At some point it stops being
15 preparation and it's an overt act toward the
16 commission.

17 MR. LIENBY: Harris was attempted possession
18 or attempted trafficking.

19 THE COURT: Let me think on that.

20 MS. KELIUM: I want part of the commentary
21 that says the authorities have found it impossible
22 to formulate a precise rule with definition or
23 what constitutes an intent which may be a part of
24 the test in all cases.

25 THE COURT: I want to say it's the jury's --

1 it is up to them.

2 MS. KELIUM: I think that the pattern
3 instruction is going to cover it. And it covers
4 what's in the statute without pulling out little
5 nuggets from the commentary as the State would
6 like. If so, I would like to pull out my own from
7 the commentary which is several pages long. What
8 it says is we don't know quite what an attempt is.
9 And we don't know quite what an attempt isn't.

10 THE COURT: Y'all come up with something
11 closer on Harris and less on commentary. You come
12 up with something as well.

13 MS. KELIUM: Wouldn't the standard one that
14 you were looking at cover it?

15 THE COURT: It does. But it's poor. Quite
16 frankly it gives an outline. It requires that the
17 defendant do some act directed toward the eventual
18 effectuation of the crime however mere, remote,
19 preparatory acts which are not reasonably in the
20 chain of causation leaving to effectuation of the
21 crime are not sufficient. Please tell me what
22 that means? I think I can sit here and break it
23 down. But as a jury charge it leaves something.

24 We're going to break tonight then. All
25 right. In the morning let's come back and

1 everything else we've got on the record.

2 MR. LISEBY: Get a copy of what's in that
3 pattern there.

4 (JURY PRESENT)

5 THE COURT: Ladies and gentlemen, it's now 20
6 minutes till 5. What time would it be in Valley?

7 JURORS: 20 minutes to 6.

8 THE COURT: We still lack a little time.
9 We've got closing arguments of counsel. We've got
10 the charge on the law. During this recess the
11 attorneys both for State and defense have been
12 presenting to me some legal arguments. I think
13 that it's going to be best to break for the day
14 and begin in the morning at 9:00. We'll be able
15 to finish the case in due course after that time.
16 And I think it would be better to go ahead and
17 break now because it will take some time to go
18 through the attorneys' arguments and through my
19 charge. It could well be that we'd be sending you
20 out to deliberate at a rather late hour. I'd just
21 rather go ahead and say that we'll finish that in
22 the morning. Follow all the instructions that
23 I've given up to this point. Don't discuss the
24 case with anyone not even amongst yourselves. I
25 do not know if there will be any media coverage of

1 this case. If there is don't look at it, don't
2 listen to it, don't read it. Turn away from it.

3 When your family and friends ask you about
4 this case and what's going on you have to tell
5 them that you're under an order not to discuss it.
6 After this case is over it will be up to you. You
7 can discuss it with anyone you wish or tell anyone
8 if you wish that you still don't want to discuss
9 it. That is up to you. But for now we've got to
10 follow this rule.

11 Everyone remain in while the jury exits. Be
12 back in the jury room at 9:00, and we'll proceed.
13 Thank you.

14 (END OF DAY)
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1 (November 14, 2003, 9:00 a.m.)

2 THE COURT: Go ahead.

3 MS. KELIUM: Your Honor, I provided the State
4 and the Court with the case of Popwell v State
5 1987 Alabama Court of Criminal Appeals case. The
6 cert was denied in 1988 by the Supreme Court of
7 Alabama.

8 In that case the facts are strikingly similar
9 to this case where they find without an actual
10 attempt to break in an overt act that involved
11 some sort of attempt to get in the house other
12 than just being there, there was no attempted
13 burglary. Here we have a case where no one
14 actually attempted to get in a door or a window or
15 a screen. And in this case Popwell v State the
16 Court clearly said it ain't enough. If you're
17 sitting there with a screwdriver trying to pry a
18 screen off it is enough. If you're simply there
19 and then you leave for whatever reason that is not
20 enough.

21 We would just ask the Court again to consider
22 our motion for judgment of acquittal considered in
23 the light most favorable to the State. Any
24 reasonable inference that the Court could take
25 from that there was no overt act committed by

1 Christopher McCullough in this case to get in the
2 house. So the attempt was not far enough.

3 THE COURT: Any further and it would have
4 been a burglary. There's evidence in this case
5 that these two defendants were wearing ski masks
6 and/or bandannas and were armed with high powered
7 pistol or pistols, at least one pistol, I think
8 that being a 9 mm. They actually approached the
9 house. There's testimony that they were at the
10 window of the house, that there's evidence
11 previously prior to that time -- prior to them
12 being at the window that they went to this house
13 with intent to burglarize this house. There's
14 even evidence and testimony that after they
15 discovered that the dwelling was occupied that
16 there was even a further evidence of still an
17 intent on the part of at least one of them to go
18 on and burglarize the house. Actually the end of
19 their action was caused only when the police
20 arrived.

21 Should there be a conviction and if under
22 those facts the Court of Criminal Appeals or
23 Supreme Court find that that's not an attempted
24 burglary, then I don't know what would be.

25 MS. KELIUM: We would just state in this case

1 clearly a woman observes somebody outside her
2 bedroom window unless she screams he runs away in
3 this case Popwell v state.

4 MR. LISENBY: Lot more evidence in this case
5 than Popwell.

6 THE COURT: That's strikingly different. Here
7 we have evidence that they intended to break into
8 the house as I've already put on the record either
9 with or without occupancy.

10 I'm going to grant on attempted burglary.
11 I'm going to give defendant's charge, State's
12 charge, and pattern charge.

13 I mean I agree, Ms. Kelium, attempt is one of
14 those strange areas of the law. And a lot of it
15 is based on subjective criteria that being
16 intent. Y'all ready.

17 MR. LISENBY: We had some others we were just
18 making copies of. I don't know if you want to
19 take a look at them.

20 THE COURT: I doubt it, but let me look.

21 MS. KELIUM: We object.

22 THE COURT: This is better than your
23 requested charge from yesterday, Mr. Lisenby. I
24 don't know that I would grant all of these. But
25 you had number four requested. I think I'm going

1 to refuse it. I stated earlier on the record I
2 would give State's four. I'm not.

3 MS. KELIUM: There's a whole lot of cases
4 interpreting that, mere preparation, even though
5 it might be an overt act is not the same.

6 THE COURT: That's exactly what we're going
7 to.

8 MS. KELIUM: I object to these things coming
9 straight out of the commentary unless you read the
10 whole commentary.

11 THE COURT: Number five is out of the Code.

12 MS. NEWSOME: Yes, it is. It's a direct
13 quote.

14 THE COURT: Number one, it's straight out of
15 the pattern charge. I'm already giving that one
16 anyway. This basically restates what Ms.
17 Kelium -- Number six is practically a statement of
18 what -- Ms. Kelium is actually I think a clearer
19 statement. Number six will be denied. Number
20 seven is a correct statement.

21 Do you have any objection to Number eight?
22 That again is a Code.

23 MS. NEWSOME: It's very similar to the one
24 Ms. Kelium requested, too.

25 MS. KELIUM: I hate throwing so much at them

1 that they're going to throw their hands up and say
2 we don't know what any of this means.

3 THE COURT: I'm going to grant it. I'm going
4 to try to put this together in a logical order.
5 An attempt I'm going to deny that.

6 MS. KELIUM: Can the Court put in the
7 statement the mere presence at the scene is not
8 enough. That's what Popwell says, mere presence
9 is not enough.

10 THE COURT: I will add that mere presence is
11 not sufficient.

12 MR. LISENBY: I think then we have to add in
13 something to the effect that is a factor that
14 can't be used in making a determination.

15 MS. KELIUM: That's not true.

16 MR. LISENBY: True in every case.

17 MS. KELIUM: Mere presence is not enough.

18 MR. LISENBY: But it's not a complete
19 statement of the law.

20 MS. KELIUM: Yes, it is. Mere presence means
21 only presence.

22 THE COURT: Mere presence is not sufficient
23 alone, but may be considered with other evidence.

24 Okay, y'all ready?

25 MR. LISENBY: I'm sorry. I have a couple of

1 quick questions. You have got a jury charge with
2 regard to testimony of the defendant?

3 THE COURT: Yes.

4 MR. LISEBY: And a jury charge with regard
5 to having been convicted of certain crimes?

6 THE COURT: Impeachment.

7 MR. LISEBY: Then the issue with regard to
8 the first offender attempted impeachment I guess.
9 I wasn't quite clear what the court ruled on
10 that.

11 THE COURT: She dropped it. We never went
12 back to it.

13 MR. LISEBY: It's just out.

14 MS. KELIUM: I'm not going to bring it up.

15 THE COURT: After objection she left it
16 alone. We moved on. I think from everything it
17 would be better just to leave it alone.

18 MS. KELIUM: I know we went over the one on
19 bias, on the interest of the witness. If we could
20 revisit that for a minute.

21 THE COURT: I'm going over the one I did
22 yesterday. Okay. All right. Bring the jury in.

23 MS. KELIUM: I just don't remember.

24 (JURY PRESENT)

25 THE COURT: Y'all be seated. Let the record

1 reflect all jurors are present, counsel present,
2 parties present. Ladies and gentlemen, at this
3 time the attorneys for both State and defense will
4 present their closing arguments to you. Remember
5 the instructions that I gave you yesterday. What
6 the attorneys say is not evidence. But they have
7 a right, duty, and obligation at the appropriate
8 times in the trial to make arguments to you. They
9 can tell you what they think the case has proven
10 or not proven. They can ask you to draw
11 reasonable inferences from the evidence. In short
12 they can argue their respective positions to you.
13 State your case to the jury.

14 * * *

15 (MR. LIENBY, MS. KELIUM, AND MR. LIENBY MADE
16 CLOSING ARGUMENTS WITH NO OBJECTION.)

17 * * *

JURY CHARGE

THE COURT: Ladies and gentlemen of the jury, at this point in the trial it is my duty to instruct you as to the law which applies to this case. The defendant is charged by way of grand jury indictment as follows: The grand jury of said county charges that before the finding of this indictment Christopher McCullough did with intent to commit the crime of burglary first degree, Section 13A-7-5 of the Code of Alabama, attempt to commit said offense by attempting to knowingly or unlawfully enter or remain unlawfully in a dwelling of another that being Mike Gragg with intent to commit a crime therein, to wit: theft, and while effecting entry or while in the dwelling or in immediate flight therefrom the said Christopher McCullough was armed with an explosive or a deadly weapon, to wit: a pistol, a further description of which is otherwise unknown to the grand jury in violation of 13A-4-2 of the Code of Alabama against the peace and dignity of the State of Alabama, signed Rea S. Clark, District Attorney.

The indictment in this case is not evidence against the defendant. It is the formal method

1 under our constitution by which a defendant is
2 accused of a crime and placed on trial. It
3 provides no proof, no presumption, and no
4 inference that the defendant is guilty of the
5 offense charged therein.

6 When a judge and a jury sit together as a
7 court of law it's the duty of the judge to see
8 that the trial progresses in an orderly fashion,
9 to rule upon all legal matters presented, and to
10 instruct the jury as to the law which applies to
11 the particular case. It is your duty as jurors to
12 follow the law as I charge you.

13 You will therefore render a verdict in
14 accordance with the facts as you determine them to
15 be from the evidence and the law as I charge you.
16 You are the sole and exclusive judges of the
17 facts. It is your duty to attempt to reconcile
18 the testimony of all witnesses so as to make them
19 all speak the truth if you can reasonably do so.
20 If you cannot reasonable reconcile all testimony
21 it is then your duty to consider the testimony
22 with a view of determining what the true facts
23 are. In doing so you may accept or reject any
24 part of the testimony of any witness and accept
25 only the testimony you consider worthy of belief.

1 During the course of the trial I have ruled
2 on certain objections by both the State and
3 defense. I don't want you to take any que one way
4 or the other as to whether I have sustained or
5 overruled those objections. If I have sustained
6 an objection and not allowed an answer to a
7 question, don't try to guess or speculate what
8 that answer might have been. At the same time if
9 I have overruled an objection and allowed a
10 witness to answer a question, don't place any
11 greater weight on the testimony that I have
12 allowed by overruling the objection. My rulings
13 are based strictly on the law and the rules which
14 apply to the trial of this case. You are to
15 consider all evidence that is admitted in light of
16 the instructions that I am now giving you.

17 I'm going to give you some other general
18 principles of law that apply generally to criminal
19 cases. And then I'm going over some specific law
20 that applies to this particular case.

21 In determining what the true facts are from
22 the evidence you may take into consideration any
23 natural interest or bias a witness may have as a
24 result of any connection with the case. You may
25 take into consideration the interest or bias a

1 witness may have shown while testifying. You may
2 taken into consideration the demeanor of any
3 witness as to whether that witness has apparently
4 testified frankly or evasively. You may take into
5 consideration any matter which you would in your
6 everyday affairs in passing upon the truthfulness
7 and accuracy of the testimony. Weigh the
8 testimony in light of your common observation and
9 experience and reach a verdict that will be based
10 upon the truth as you determine it to be from all
11 of the evidence and the law as I charge you.

12 If you believe that any material part of the
13 evidence of any witness was willfully false, you
14 may disregard all of the testimony of that
15 witness.

16 In arriving at a verdict in this case you
17 must not permit sympathy, prejudice, or emotion to
18 influence you one way or the other.

19 Evidence may be introduced in any criminal
20 case for the purpose of impeaching certain witness
21 testimony, that is, to discredit their testimony.
22 The law permits that a witness may be impeached in
23 several ways. For instance a witness may be
24 impeached by proof of contradictory statements
25 made by that witness while on the stand in this

1 case or by contradictory statements made by a
2 witness at other times or places whether under
3 oath or not or by evidence of bad character or by
4 a showing of a conviction of a crime involving
5 moral turpitude. But the fact that a witness has
6 been impeached does not necessarily mean that you
7 must discard all of that witness's testimony
8 either in whole or in part. There may be other
9 evidence in the case or other facts and
10 circumstances in the evidence which in your
11 judgment may tend to support or corroborate a
12 witness's testimony or some part or parts of it.

13 As I have already charged you you are the
14 sole and exclusive judges of the credibility of
15 witnesses and of the weight that you will accord
16 their testimony.

17 In arriving at the true facts you are
18 directed to take into account all of the testimony
19 of all witnesses. It is your duty to attempt to
20 reconcile all the testimony so as to make all the
21 witnesses speak the truth if you can do so
22 reasonably.

23 If you cannot reasonably reconcile all of the
24 testimony of all of the witnesses, then you are to
25 use your common sense, your knowledge, and your

1 understanding that everyone gains in their
2 everyday affairs and that you are to use all of
3 your experience that you have acquired in your
4 dealings with other people in everyday life. You
5 should take this knowledge with you and use it to
6 determine what the true facts are and the weight
7 that you are to give each part of the testimony of
8 the witnesses. You're not speculate where there's
9 no evidence, but where there is conflicting
10 evidence use your common sense to resolve the
11 conflict if you can do so reasonably.

12 The defendant may testify as a witness in his
13 own behalf. And when he does so you may take into
14 consideration the testimony of the defendant along
15 with all other evidence in the light of the fact
16 that he is the defendant and the interest he has
17 in your verdict. This is to be taken in
18 consideration together with all other evidence or
19 lack of evidence.

20 In determining what the true facts are in
21 this case you are limited to the evidence that has
22 been presented from the witness stand as opposed
23 to matters that have been stated to you by the
24 attorneys during the course of the trial. What
25 the attorneys have said both for the State and

1 defense is not evidence in the case and what they
2 have argued to you at various points in the trial
3 is not evidence. They have a right, duty, and
4 obligation at the appropriate times in the trial
5 to comment on the evidence and to ask you to draw
6 reasonably inferences from the evidence as they
7 argue their respective positions to you. But what
8 they say is not evidence. And you should put what
9 they say in the proper category in your thinking.
10 It should not be in the evidence category just as
11 the indictment in this case should not be in the
12 evidence category.

13 Under the law in Alabama it is the duty of
14 the judge to set a penalty after due consideration
15 presented at a sentencing hearing. It is improper
16 for the jury to be concerned with the penalty to
17 be imposed upon the defendant in this case if
18 there should be a verdict of guilty as to any
19 offense charged.

20 In coming before you, a jury of his peers,
21 upon a plea of not guilty the defendant is
22 presumed to be innocent of the charges against
23 him. This presumption remains with him throughout
24 every stage of the trial and during your
25 deliberations on the verdict and is not overcome

1 unless from all the evidence in the case you are
2 convinced beyond a reasonable doubt that the
3 defendant is guilty. The presumption of innocence
4 with which the defendant enters trial is a fact in
5 this case which must be considered with all the
6 other evidence in the case and is not to be
7 disregarded by you.

8 As I have already told you the burden of
9 proof is upon the State to prove the defendant
10 guilty as charged. Before a conviction can be had
11 in this case the State must satisfy each and every
12 member of the jury of the defendant's guilt beyond
13 a reasonable doubt. Even if the State
14 demonstrates a probability of guilt it does not in
15 establish it beyond a reasonable doubt. And in
16 that case you must acquit the defendant.

17 The phrase "reasonable doubt" is
18 self-explanatory. Efforts to define it do not
19 always clarify the term. It is not a mere
20 possible doubt because everything relating to
21 human affairs is open to some possible or
22 imaginary doubt. A reasonable doubt is a doubt of
23 a fair-minded juror honestly seeking the truth
24 after careful and impartial consideration of all
25 evidence in the case. It is a doubt based upon

1 reason and common sense. It does not mean a vague
2 or arbitrary notion. But it is an actual doubt
3 based upon the evidence, a lack of evidence, a
4 conflict in the evidence, or any combination
5 thereof. It is a doubt that remains after going
6 over the entire case in your mind and giving
7 consideration to all testimony. It is
8 distinguished from a doubt arising from mere
9 possibility, from bear imagination, or from
10 fanciful conjecture.

11 If after considering all of the evidence you
12 are convinced of the defendant's guilt beyond a
13 reasonable doubt, then it would be your duty to
14 convict the defendant. However, if you still have
15 a reasonable doubt the defendant is entitled to
16 the benefit of that doubt and should be acquitted.

17 There can be direct evidence presented and
18 there can be circumstantial evidence presented.
19 In regard to circumstantial evidence I charge you
20 that a person charged with a crime may not be
21 convicted by circumstantial evidence alone unless
22 the evidence excludes beyond a reasonable doubt
23 and to a moral certainty every reasonable
24 conclusion other than that of the guilt of the
25 defendant. No matter how strong the circumstances

1 they do not come up to the full measure of proof
2 which the law requires if they can be reasonably
3 reconciled with the theory that the defendant is
4 innocent.

5 Now, the indictment charges attempted
6 burglary in the first degree. The law in Alabama
7 provides that there is a separate category for
8 attempts of certain crimes. Now, the attempt or
9 the law on attempt incorporates whatever law is
10 alleged to have been attempted to be committed.
11 In this case we have a statute, a law, that deals
12 with attempts. The indictment in this case
13 follows that law.

14 Now, for the offense alleged to be attempted
15 the indictment says that it's burglary in the
16 first degree. Now, I'm going to charge you on
17 that. But I'm also going to give you another
18 charge which I hope to explain thoroughly of
19 attempted burglary in the second degree. So I'm
20 going to give you two separate charges on attempt,
21 one for burglary first, one for burglary second
22 degree.

23 The defendant is charged with attempted
24 burglary in the first degree. A person commits
25 the crime of attempted burglary in the first

1 degree if with the intent to commit the offense
2 attempted he does any overt act towards the
3 commission of that offense. To convict the State
4 must prove beyond a reasonable doubt each of the
5 following elements of the offense of attempted
6 burglary in the first degree. One, that the
7 defendant Christopher McCullough intended to
8 commit the crime of burglary in the first degree;
9 two, that acting with the intent to commit the
10 crime of burglary in the first degree, the
11 defendant did an overt act towards the commission
12 of such offense.

13 A person commits the crime of burglary in the
14 first degree if he knowingly and unlawfully enters
15 or remains unlawfully in a dwelling and he does so
16 with the intent to commit a crime therein and
17 while effecting entry or while in the dwelling or
18 in immediate flight therefrom he or another
19 person, he or another person, in the crime is
20 armed with a deadly weapon.

21 To convict of burglary in the first degree
22 the State would have to prove beyond a reasonable
23 doubt that the defendant Chris McCullough
24 knowingly and unlawfully entered or remained
25 unlawfully in the dwelling of Mike and Judith

1 Gragg, that in doing so he acted with intent to
2 commit a crime therein, and three that while in
3 the dwelling or in effecting entry thereto or in
4 immediate flight therefrom the defendant or
5 another participant in the crime was armed with a
6 deadly weapon.

7 So I have just gone over the elements of
8 burglary in the first degree. And I'll go over
9 the elements of burglary in the second degree at
10 this time. I want you to keep in mind that the
11 attempt statute will apply to both charges, both
12 the charge of attempted burglary first degree and
13 to the charge of attempted burglary second degree.

14 A dwelling is a building which is used or
15 normally used by a person for sleeping, living, or
16 lodging therein. An intruder acts knowingly if he
17 is aware of the fact that he is no license or
18 privilege to enter or remain. A person acts with
19 intent with respect to a result or to conduct when
20 his purpose is to cause that result or to engage
21 in that conduct. A person enters or remains
22 unlawfully in or upon a premises when he is not
23 licensed, invited, or privileged to do so.

24 A deadly weapon is a firearm or anything
25 manifestly designed, made, or adapted for the

1 purpose of inflicting death or serious, physical
2 injury. I charge you that a pistol is a deadly
3 weapon.

4 A person would commit burglary in the second
5 degree if he unlawfully enters or -- excuse me, if
6 he unlawfully enters a lawfully occupied dwelling
7 and he does so with intent to commit a theft or a
8 felony therein. To convict of burglary in the
9 second degree the State must prove beyond a
10 reasonable doubt each of the following elements of
11 burglary in the first degree: That the defendant
12 Chris McCullough unlawfully entered or remained
13 unlawfully in a lawfully occupied dwelling of Mike
14 and Judith Gragg and that in doing so the
15 defendant acted with intent to commit a theft or a
16 felony therein, namely, theft.

17 The difference between first degree and the
18 second degree that I have just gone over with you
19 is that in first degree the defendant or a
20 participant, another participant in the crime,
21 must be armed with a deadly weapon. In burglary
22 in the second degree the defendant must unlawfully
23 enter a lawfully occupied dwelling. No mention of
24 a deadly weapon in that one. Both of these
25 charges involve dwellings. First degree involves

1 a weapon. Second degree involves the entry into a
2 lawfully occupied dwelling.

3 What constitutes -- you have got to keep in
4 mind now I have just given you the law as pertains
5 to burglary. You have got to keep both burglary
6 first and burglary second in mind of the attempt
7 statute. The State in their indictment has not
8 alleged that there was a burglary in the first or
9 second degree. It's that there was an attempted
10 burglary in the first degree as contained in the
11 indictment. And I'm charging you simply so you
12 can consider whether the evidence applies to
13 burglary in the second degree that being the
14 attempt for the burglary in the second degree.

15 You have heard me say that there must be an
16 overt act for a finding of attempt. What
17 constitutes commission of an overt act toward the
18 commission of burglary in the first degree or
19 burglary in the second degree is for the jury to
20 decide under the circumstances, it requires that
21 the defendant do some act directed toward the
22 eventual effectuation of the crime. However, mere
23 remote preparatory acts which are not reasonably
24 in the chain of causation leading to the
25 effectuation of the crime are not sufficient.

1 Mere presence of a defendant is not sufficient
2 alone, but it is a factor that may be considered
3 along with all other evidence.

4 An attempted burglary consists of an act done
5 with the intent to effectuate a burglary carried
6 beyond mere preparation to commit it, but falling
7 short of its actual commission. An indictable
8 attempt does consist of two important elements,
9 one, an attempt to commit burglary and, two, a
10 direct ineffectual act done toward its commission.

11 In order to prove an attempted burglary the
12 State must show an act done with the intent to
13 effectuate the alleged burglary. Intent has been
14 defined as a state of mind existing at the time a
15 person commits an offense. If intent required
16 definite and substantive proof, it would be almost
17 impossible to convict absent facts disclosing a
18 culmination of the intent. The mind of an alleged
19 offender however may be read from his acts,
20 conduct, and inferences fairly deductible from all
21 of the circumstances.

22 Although an overt act does not establish the
23 particular intent to commit a specific crime,
24 intent being a state of mind or mental process may
25 be proved by the statement or act of the person

1 whose act is being scrutinized and may also be
2 inferred from the facts and circumstances as in
3 the case in consummated crimes.

4 A person is guilty of an attempt to commit a
5 crime if with intent to commit a specific offense
6 he does any overt act toward the commission of
7 such offense. One is criminally liable for
8 attempting the commission of a crime even though
9 his endeavor falls short of the ultimate intended
10 objective. An attempt to commit a crime consist
11 of three elements, one, an intent to commit a
12 crime, two, performance of some overt act toward
13 commission of that offense, and, three, failure to
14 consummate the commission of the crime.

15 A person is not liable if under circumstances
16 manifesting a voluntary and complete renunciation
17 of criminal intent he avoided the commission of
18 the offense attempted by abandoning his criminal
19 effort. And mere abandonment is not sufficient to
20 accomplish the avoidance by taking further and
21 other affirmative steps toward preventing the
22 commission thereof.

23 So I want you to take all of the law that I
24 have just charged on attempt and consider it in
25 connection with first the allegation of attempted

1 burglary first degree, then attempted burglary
2 second degree.

3 If you find from the evidence that the State
4 has proved beyond a reasonable doubt all of the
5 elements of the offense of attempted burglary
6 first degree as charged, then you should find the
7 defendant guilty of attempted burglary first
8 degree as charged.

9 If, however, you are not satisfied that the
10 State has proven beyond a reasonable doubt each of
11 the elements of attempted burglary first degree as
12 charged, you may then consider whether the State
13 has proven the defendant guilty beyond a
14 reasonable doubt of the offense of attempted
15 burglary second degree.

16 If you find that they have met their burden
17 as to attempted burglary second degree, you would
18 then find the defendant guilty of that offense.

19 If you find from the evidence and law that I
20 have charged you that the State has not met their
21 burden of proof as to either attempted burglary
22 first degree or attempted burglary second degree,
23 you should acquit the defendant.

24 An accomplice is defined as an associate in
25 crime or a partner in crime. A conviction for a

1 felony offense cannot be had on the testimony of
2 an accomplice unless such testimony is
3 corroborated by other evidence tending to connect
4 the defendant with the commission of the offense.
5 And the rule is that such other evidence to be
6 sufficient must be believed by the jury beyond a
7 reasonable doubt.

8 The proper test for determining whether there
9 is sufficient corroboration of the testimony of an
10 accomplice is first to eliminate the evidence of
11 the accomplice. And then if upon examination of
12 all other evidence there is sufficient
13 incriminating evidence tending to connect the
14 defendant with the commission of the offense there
15 is sufficient corroboration.

16 A person is legally accountable for the
17 behavior of another constituting a criminal
18 offense if with intent to promote or assist the
19 commission of an offense he procures, induces, or
20 causes such other person to commit the offense or
21 he aids or abets another person in commission of
22 the offense or having a legal duty to prevent the
23 commission of the offense he fails to make the
24 effort he is required to make by law to prevent
25 said offense. The words "aid or abet" comprehend

1 all assistance rendered by acts or words of
2 encouragement or support or presence actual or
3 constructive to render assistance should it become
4 necessary.

5 Ladies and gentlemen, all 12 of you must
6 agree -- and it will soon be 12 of you -- must
7 agree before you can reach any verdict in the
8 case. Your verdict must be the verdict each and
9 every juror. You are the sole judges as to weight
10 that should be given all testimony in the case.

11 It is my duty to decide the law. It is your
12 duty to determine the facts. I have no opinion
13 as to the facts of this case. And I don't want
14 you to think from anything I've said in the charge
15 or otherwise or any ruling that I have made that I
16 think one way or the other about the facts of the
17 case. Take the testimony of all witnesses
18 together with all proper and reasonable inferences
19 which may be drawn therefrom and apply your common
20 sense. In a fair, impartial, and honest way
21 determine what you believe to be the truth.

22 You should weigh all evidence and reconcile
23 it if you can reasonably do so. But if you cannot
24 so reconcile a conflict in evidence you ought to
25 take that evidence which you think is worthy of

1 credit and give it just such weight as you think
2 it is entitled to receive.

3 I have prepared verdict forms in this case
4 for you. Now, the verdict form must be signed by
5 your foreperson. And it must correspond to your
6 actual verdict and vote which must be unanimous.

7 When you go back to the jury room you may
8 choose whatever method you think is appropriate in
9 determining who will be the foreperson. The
10 foreperson will actually sign the appropriate
11 verdict form and will act as a moderator of your
12 deliberations.

13 I told you in the beginning that you're
14 dealing with two separate bodies of law in this
15 particular charge or charges. This is a charge of
16 attempted burglary first degree or attempted
17 burglary in the second degree. I went over all of
18 the law about each one of those. First degree
19 focusing on one or more participant being armed
20 with a deadly weapon. Second degree does not have
21 that requirement, but it does require an attempted
22 entry into an lawfully occupied dwelling.

23 If after considering all evidence in the case
24 in light of the laws as I have charged you you
25 find the State has met their burden of proving

1 beyond a reasonable doubt all of the elements of
2 attempted burglary first degree, you should find
3 the defendant guilty of that charge. And your
4 foreperson would need to sign top verdict line
5 which reads as follows: we, the jury, find the
6 defendant Christopher McCullough guilty of the
7 offense of attempted burglary in the first degree
8 as charged in the indictment. Your foreperson
9 will have to sign that line.

10 If on the other hand you find from the
11 evidence presented in light of the law that I have
12 instructed you that the State has not met their
13 burden of proving the defendant guilty beyond a
14 reasonable doubt of attempted burglary in the
15 first degree, but they have met their burden of
16 proving the defendant guilty beyond a reasonable
17 doubt of burglary in the second degree, then it
18 would be your duty to convict the defendant of
19 that offense. And your verdict would read as
20 follows: we, the jury, find the defendant
21 Christopher McCullough guilty of the offense of
22 attempted burglary in the second degree a lesser
23 included of burglary in the first degree as
24 charged in the indictment. Your foreperson would
25 need to sign the second verdict form.

1 If on the other hand you find from the
2 evidence presented and law that I have instructed
3 you that the State has not met their burden of
4 proving the defendant guilty beyond a reasonable
5 doubt of either attempted burglary first degree or
6 attempted burglary second degree, then it would be
7 your duty to acquit the defendant. And your
8 verdict would read as follows: we, the jury, find
9 the defendant Christopher McCullough not guilty.
10 Your foreperson would need to sign on the third
11 verdict form line.

12 At the very bottom of the page there is a
13 place where your foreperson needs to print his or
14 her name and date today's date on this verdict
15 form.

16 After you have deliberated, after you have
17 reached your unanimous verdict, and after your
18 foreperson has signed the appropriate verdict form
19 he or she needs to simply fold this verdict form
20 in half, knock on the door, I'll have you brought
21 back out here in open court where I'll announce
22 the verdict.

23 Ladies and gentlemen, at one time we had only
24 a jury of 12 on a criminal case. If any juror
25 became ill, had a family emergency, or anything of

1 that sort in all likelihood a mistrial would have
2 to be declared. The law was changed so alternate
3 jurors could be here and hear all the evidence and
4 hear the law and be ready to step into the place
5 of any juror who for whatever reason could not
6 continue with their duty. And believe me over the
7 past few years we've used alternate jurors in so
8 many occasions. However, here we do not have the
9 need for the use of the alternate jurors. And
10 those alternate jurors will be released. You may
11 report to Mr. Story and be discharged from further
12 obligation for this term of court. The alternate
13 jurors are William Booker and Bobby Clark. Thank
14 you, gentlemen. Y'all may report up to Mr.
15 Story's office at the end of the hall.

16 Counsel, y'all make sure that all of the
17 exhibits of evidence that are to go to the jury
18 are properly put together. What says the State as
19 far as the charge?

20 MR. LISEBY: State is satisfied.

21 THE COURT: And defense?

22 MS. KELIUM: With exceptions already noted
23 defense is satisfied.

24 THE COURT: Ladies and gentlemen, y'all may
25 retire, deliberate, and reach your verdicts.

1 Y'all need to carry these items with you.

2 * * *

3 (JURY BEGINS DELIBERATION AT 10:32 A.M.)

4 * * *

5 (JURY RETURNED WITH THE FOLLOWING VERDICT
6 AT 11:35 A.M.)

7 (JURY PRESENT)

8 THE COURT: Ladies and gentlemen of the jury,
9 have you reached a verdict? And, first of all,
10 let me ask you, have you chosen -- second, let me
11 ask you if you have chosen a foreperson?

12 FOREPERSON: Yes, sir.

13 THE COURT: Let me read and ask you is this
14 your verdict? We, the jury, find the defendant
15 Christopher McCullough guilty of the offense of
16 attempted burglary in the first degree as charged
17 in the indictment. Is this your verdict?

18 FOREPERSON: Yes.

19 THE COURT: Is there a request for polling of
20 the jury by defense?

21 MS. KELIUM: No, Your Honor.

22 THE COURT: No request. Ladies and
23 gentlemen, I want to thank you for your service
24 throughout these two weeks. I know it's been a
25 long term of court. I want you to know without

1 your willingness to sit and serve on these juries
2 we would have made no progress.

3 (JURY DISMISSED)

4 THE COURT: Mr. McCullough, you may remain
5 where you are. We're on the record at this time.
6 Based upon the verdict of the jury, the Court
7 hereby finds that you are guilty of the offense of
8 attempted burglary first degree as charged. And I
9 adjudicate you guilty of that offense at this
10 time.

11 Is there a request for a pre-sentence report?

12 MS. KELIUM: One has already been done, Your
13 Honor. We do not request additional.

14 THE COURT: Any other applications to be
15 made?

16 MS. KELIUM: No, Your Honor.

17 THE COURT: The formal sentencing hearing in
18 this matter will be set for December 16th at 1
19 p.m. The defendant will be remanded to custody
20 pending sentencing on that date. You may do
21 whatever with him you need to do at this time
22 before you bring the other folks back in.

23 MR. LISEBY: Judge, I'd like to put on the
24 record that at sentencing the State will be asking
25 for enhancements under the habitual offender act

1 for the receiving stolen property second degree
2 charge that Mr. McCullough admitted on the stand
3 as well as the enhancement for the use of a
4 firearm during the course of an offense involving
5 a Class A felony.

6 THE COURT: So noted.

7 END OF PROCEEDINGS
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CERTIFICATE OF COMPLETION OF REPORTER'S TRANSCRIPT

CHRISTOPHER MCCULLOUGH

Appellant

VS

STATE OF ALABAMA

To: Clerk of the Court
of Criminal
Appeals

Case No: CC 02-318

Date of Notice

Of Appeal:

4/1/2004

* * * * *

I, FRANCES P. LOONEY, OFFICIAL COURT REPORTER

FOR THE FIFTH JUDICIAL CIRCUIT OF ALABAMA, HEREBY

CERTIFY THAT I HAVE THIS DATE COMPLETED AND FILED

WITH THE CLERK OF THE TRIAL COURT THE ORIGINAL AND

THREE COPIES OF A TRUE AND CORRECT TRANSCRIPT OF

ALL THE EVIDENCE AND MATTERS TAKEN IN THE

ABOVE-STYLED CAUSE. ALL PAGES ARE NUMBERED

SERIALLY, PREFACED BY AN INDEX AND ENDING WITH THE

NUMBER APPEARING AT THE TOP OF THIS CERTIFICATE.

I FURTHER CERTIFY THAT A COPY OF THIS
CERTIFICATE HAS THIS DATE BEEN SERVED ON THE CLERK
OF THE APPELLATE COURT, THE DISTRICT ATTORNEY'S
OFFICE; THE ATTORNEY GENERAL'S OFFICE; AND COUNSEL
FOR THE DEFENDANT.

DATED THIS 27th DAY OF May, 2004.

Frances P. Looney
OFFICIAL COURT REPORTER

MAY 27 2004

CHARLES W. STORY
CIRCUIT CLERK

CHAMBERS COUNTY, ALABAMA

My commission expires 12/27/2005

*** Frances L. Roark ***

COPY

IN THE CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT OF ALABAMA
CHAMBERS COUNTY

STATE OF ALABAMA,

Versus

CHRISTOPHER McCULLOUGH,
Defendant.

*
* CRIMINAL NO.
* CC-2002-000318
* LaFayette, Al.
* 15 January, 2004
*

TRANSCRIPT OF SENTENCING BEFORE
THE HONORABLE RAY D. MARTIN,
CIRCUIT JUDGE

A P P E A R A N C E S:

For the State

BILL LISENBY, DISTRICT ATTORNEY
FIFTH JUDICIAL CIRCUIT
CHAMBERS COUNTY COURTHOUSE
LaFAYETTE, AL 36862

BY: BILL LISENBY, DA
AMY NEWSOME, ADA

For the Defendant

KYLA KELIM, ATTNY
ATTORNEY AT LAW
POST OFFICE BOX 1977
ALEXANDER CITY, AL 35011-1977

FRANCES L. ROARK, CSR
OFFICIAL COURT REPORTER
FR4L035

*** Frances L. Roark ***

1 PROCEEDINGS: In Open Court.

2 THE COURT: On November 14, 2003, a duly impaneled
3 jury returned the the following verdict : "We, the jury,
4 find the defendant, Christopher McCullough, guilty of the
5 offense of attempted burglary in the first degree, as
6 charged in the indictment. " Signed by Gerald Morgan,
7 foreperson.

8 If not done so on the record previously, at this
9 time, based upon the verdict of the jury, I find that this
10 defendant is guilty of the offense of attempted burglary in
11 the first degree as charged in the indictment.

12 Now, we'll proceed to matters of sentencing at this
13 time. And, for the record, the defendant is present before
14 the Court with his counsel, Kyla Kelim. The District
15 Attorney, Bill Lisenby, is present for the State.

16 Has everyone had an opportunity to review the
17 presentence report prepared by the probation officer in this
18 case?

19 MS. KELIM: Yes, Your Honor.

20 THE COURT: Is there anything that needs to be
21 amended, deleted, or changed in regard to the report?

22 MS. KELIM: Not in substance as such, Your Honor.

23 THE COURT: Very good. All right. First, what
24 says defendant in regard to the issue of sentencing?

25 MS. KELIM: Your Honor, in this case, this is a

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1 class B felony with one prior. Also there was a -- the jury
2 found a firearm was involved, so the same enhancement would
3 apply, to make the range of punishment 10 years to 99 or
4 life.

5 This case was one of a series of events that occurred
6 within a several week period. Mr. McCullough and his
7 codefendant were arrested this date near the Graggs'
8 property and ultimately charged in four other offenses. One
9 of those cases went to trial the term before this one, and
10 Mr. McCullough was convicted.

11 The State has, to my knowledge, always put forth the
12 same plea offer to all of us. There were several attorneys
13 involved before me, and that plea offer, was 35 years. To
14 my knowledge no formal plea offer other than that was ever
15 made. The codefendant in this case received a sentence of
16 20 years. In a prior case Mr. McCullough was convicted of a
17 class A felony, that of burglary in the first degree, and
18 the same range of punishment applied, the same prior offense
19 applied, and in that case, which is a more serious offense,
20 the judge in that case, after a jury conviction, sentenced
21 Mr. McCullough to 15 years.

22 We argue that that sentence was more than
23 appropriate. The probation officer notes that for several
24 factors Mr. McCullough should be given the maximum sentence,
25 which I can only think means 99 years or life, since that is

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1 the range in this case, which is inappropriate given the
2 unremarkable nature of his prior record.

3 He has several offenses going back more than a decade
4 when he was very young. And the bulk of the other offenses
5 listed are driving offenses. No doubt his driving record is
6 remarkable for being pretty awful. He has several
7 speedings, loud music, no seatbelt, vehicle entering
8 roadway, no insurance, suspended license, and definitely he
9 is a terrible driver all the way to the present. The other
10 offenses, with the exception of one prior felony, which was
11 a receiving stolen property offense in 1993, more than a
12 decade ago, are the pending charges. Other than the one
13 offense, which I mentioned he was convicted of last term,
14 but none of those are prior offenses.

15 I have represented a whole lot people with worse
16 records than this that weren't recommended maximum
17 sentences. The only other reason proffered for the
18 imposition of such a harsh sentence is a continued bad
19 attitude. This Court and this forum should not be a
20 personality contest. If Mr. McCullough has a bad attitude
21 while incarcerated he certainly is going to suffer an
22 enhanced punishment for that in the form of not being
23 granted parole. He will serve day for day a sentence that
24 this court imposes.

25 We certainly are not going to stand here and discount

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1 the level of emotion that the victims in this case were put
2 through. When you are in your home, your home is your
3 castle. And persons on your property without permission who
4 appear to have bad intentions are going to cause a severe
5 amount of emotional alarm. And, I would be the last one
6 arguing otherwise.

7 This simply is a case that we were not given an
8 opportunity to take care of in a more economical fashion.
9 I, as a State-appointed attorney, am constantly, on a daily
10 and weekly basis, barraged about cutting costs, cutting my
11 bills, cutting my services, and saving State resources.
12 And, this Court is well aware of the amount that the Court
13 has had cut in State resources. The State has thought
14 nothing of having to serially try five cases when there is a
15 mechanism to resolve these matters. The Judge who has heard
16 the sentencing and the trial in the last case, which was a
17 class A felony, gave him what would have been an appropriate
18 sentence: That of 15 years. We have endeavored to get a
19 more reasonable offer than 35. Which simply, in view of the
20 fact, he had a 15-year sentence on a more serious charge,
21 was just not reasonable. The State fully intends to
22 serially try all these cases. This is the second. We have
23 two more years of cases to look forward to with an
24 additional amount to spent for attorneys fees, jury costs,
25 for witness costs, for investigative costs, and there's no

*** Frances L. Roark ***

1 purpose for that. The State should be held to the same
2 standard that I am, quietly frankly, in resolving these
3 cases, a matter which we have discussed extensively.

4 The other facts which are really not mentioned in the
5 PSR, while they do mention briefly the other burglaries that
6 were involved in this case, this was an attempted burglary.
7 In the other cases, all of the cases, there were virtually
8 no contact with any of the occupants. In one, or perhaps
9 two, cases where a home owner was present, upon making their
10 presence known, according to the police reports,
11 Mr. McCullough, he and the codefendant, fled the property,
12 and did not encounter, directly encounter, the home owners.
13 In the two other case, the homes were unoccupied.

14 This is the case that is appropriate for a 15-year
15 sentence, which is what Mr. McCullough has been sentenced
16 to previously for the more serious offense.

17 THE COURT: Mr. Lisenby?

18 MR. LISENBY: Yes, Your Honor. I appreciate the
19 opportunity to address you. I would, if the court permit,
20 ask that Mr. Gragg be allowed to address you now and then I
21 would like to add some comments after what he says.
22 Mr. Gragg, was the victim.

23 Tell the Court your name for the record and tell the
24 Court what you would like him to know in regard to the
25 sentencing of Mr. McCullough.

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1 MR. GRAGG: Your Honor, my name is Charles
2 Michael Gragg. I am one of the victims of Christopher
3 McCullough's crime along with my wife, and my children, and
4 my grandchildren.

5 On March 19th of 2002, our lives pretty much turned
6 upside down. As a God-fearing Christian, I tended to trust
7 people and look for the good in folks in the past. And,
8 while we always took ordinary precautions around our house,
9 a security system, et cetera, I never really seriously ever
10 worried about being safe, as defense counsel says, in the
11 privacy of my own home. Because, my home is my castle, or I
12 thought it was.

13 This has had an absolutely traumatic impact on me, my
14 wife, and my children, directly and indirectly. I really
15 thought that I had been afraid in my life prior to that day.
16 And I just thought I had been afraid prior to that day. I
17 literally was scared to death. I was convinced that
18 somebody was going to die that day. Because masked guys
19 don't come to your house at 10 o'clock in the morning, or
20 just prior to, on a beautiful, beautiful spring morning. It
21 is not supposed to happen that way.

22 God intervened that day. As I believe Mr. Lisenby
23 said, I believe, in his opening remarks of Christopher
24 McCullough's trial, everything went right that day. Your
25 Honor heard the testimony of his codefendant. And, in his

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1 trial that when he picked up Billy Norris -- when
2 Christopher McCullough picked up Billy Norris to come to our
3 house for the purpose of parking behind the cemetery and
4 slipping through the woods, they were coming with one intent
5 and that was to get in our home, regardless of what that
6 took or how they had to do it. And, Your Honor, will recall
7 that Billy Norris testified that when he opened the door of
8 the car to get in at Kroger parking he saw the roll of duct
9 tape.

10 He said, "What's that for? "

11 He said, "We are going to need this."

12 I was convinced by that testimony that Christopher
13 McCullough was going to get in that house regardless of
14 whether it was occupied or not. They then came to the house
15 and we heard Billy Norris testify under oath that even when
16 they absolutely were 100 percent certain that the house was
17 occupied, Billy Norris wanted to leave, and Christopher
18 McCullough was determined -- he had his gun, he had his duct
19 tape, he was determined to get in that house, and he said
20 words that haunt me to this day, "It is just too good. It's
21 just too good."

22 I guess, based on the size of the house -- it is not
23 a huge house, but it is a nice house. I am proud of it. I
24 worked hard for it. But, it was just too much of a
25 temptation. He was going to get in there and do whatever

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1 he needed to do. And, Your Honor, somebody
2 would have died that day. Somebody would have died if they
3 had gotten in that house. Because I was, for the first time
4 in my life, I was prepared to take another human's life. I
5 would have done it without hesitation, because I was that
6 afraid. But had they gotten in that house and gotten by me,
7 they would have had to have killed me, because if they
8 knocked every tooth in my head out but one, I would have
9 fought with that tooth. I would have fought with anything I
10 could have gotten my hands on before they would have touched
11 my wife.

12 Your Honor, I respectfully -- I request that you
13 consider the testimony by Billy Norris in this trial. The
14 fact that he was armed with a gun. The fact that he had
15 duct tape. The fact he intended on getting in the house
16 knowing someone was there. I would request, Your Honor,
17 that you consider that. And, I would not just request, I
18 would beg this Court, to give him the maximum possible
19 sentence. First of all for this individual trial.
20 Secondly, I would ask, Your Honor, to please consider the
21 fact that he is a convicted felon. That certainly falls
22 within the Habitual Felony Act. I know, Your Honor,
23 probably can't consider the up coming felony trials that he
24 is to undergo. This man is an affront to society. This man
25 is dangerous. This man, if and when, I am sure some day he

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1 will get out, when that happens, based on his background
2 that I now know a lot about, something bad is going to
3 happen to somebody else, if he doesn't get killed first.
4 So, I would ask that Your Honor not only give him the
5 maximum sentence on our individual crime that was about to
6 occur, because -- I know Your Honor sees every -- probably
7 every type of criminal act that comes through this courtroom
8 or your courtroom that exists. And I know attempted
9 burglary in the first degree probably doesn't sound very
10 jazzy or serious to a lot of folks. There was a line and it
11 got crossed early in the process that morning. The intent
12 was going to be this was going to be worse than an attempted
13 burglary. This was going to be worse than a burglary. I
14 pray thanks to God every day that God did intervene and the
15 lady who was in our house did see them. The Lanette Police
16 Department made it in less than three minutes to my home and
17 captured these guys. And there's not a night that goes by
18 that I don't wake up and say a prayer. If I hear a noise or
19 just wake up, I say, "God, please keep us safe." I am a
20 praying man, but I've never prayed as much as 10 or 12 times
21 a night. I pray in my own bed in my own home, "God, please,
22 just keep us safe." I would ask that Your Honor help keep
23 us safe and help keep the members our community safe, and
24 put this man a way. Thank you for listening.

25 MR. LISENBY: Judge, what I would like to say is,

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1 I do have a certified copy of the conviction of receiving
2 stolen property second degree if I need to introduce that.
3 I know that Mr. McCullough actually admitted that during the
4 course of the trial, and I think that is sufficient for the
5 Habitual Offender purpose, but I have it if necessary.

6 MS. KELIM: That's fine.

7 MR. LISENBY: A couple of things I would like to
8 point out with regard to Mr. McCullough's record. It's a
9 little bit more extensive than just some traffic incidents.
10 The Court has had an opportunity to review it and from
11 talking about it in juvenile court. Theft of property,
12 breaking and entering into a vehicle back as far as 1989,
13 another receiving stolen property charge in 1992, domestic
14 violence charge in the year 2000, wherein he actually
15 received some jail time, indicating the fact that he is a
16 dangerous individual; and, of course, the felony of
17 receiving stolen property second degree.

18 As defense counsel stated in the other cases, there
19 were no -- there was no contact between Mr. McCullough,
20 Mr. Norris, and the occupants except for the one other case
21 that is still pending. The case which she referred to
22 earlier that was tried in this court, and in which he was
23 found guilty, was a burglary first degree, because there was
24 a theft of a rifle involved. It was not because it was an
25 occupied home. It was not because there was any physical

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1 injury to the occupants. It was because there was a firearm
2 involved in the commission of the offense: That being the
3 theft of the firearm from the house itself.

4 Now, the Court there felt that was an appropriate
5 sentence. This is a much more serious offense here. These
6 individuals came armed with weapons. And they came with
7 masks on. And they came during the middle of the day. And
8 they were aware of the possibility and the probability that
9 the home was going to be occupied which was evidenced by the
10 fact they did have duct tape with them.

11 Again, as defense counsel said, we did try to work
12 out something with regard to all of these cases, but we had
13 to, as far as the State, we had to take into consideration
14 the fact of all of the cases, this being the most serious,
15 to try to negotiate some kind of plea. If in fact the
16 defendant wanted to enter a plea, he could have done that at
17 any time without agreement with the State. That is his
18 right at any time. He declined to do that. He declined our
19 offer and he went to trial. That does not have anything to
20 do with whether we are saving money or not saving money or
21 anything of that nature.

22 Because of the nature of this offense, because of the
23 prior record involved with this defendant, because of the
24 fact that he was armed with a firearm at the time, masked as
25 he went to this occupied home; the State requests that the

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1 Court give him a sentence of 60 years in prison. And, of
2 course, that would not make him eligible for any type of
3 probation. We would ask for that sentence, Your Honor.

4 THE COURT: Do you have anything to say before the
5 Court passes sentence?

6 MS. KELIM: The only thing I would mention, Your
7 Honor, as I stated, no one, me least of all, in this room
8 would ever discount any of the feelings Mr. Gragg and his
9 family have from this sort of invasion of privacy. However,
10 a lot of their fears are predicated on the words of a
11 convicted liar. The jury was under no such compulsion to
12 convict Mr. McCullough. They did not have believe to
13 Mr. Norris. The -- those series of events were
14 self-serving, obviously, to Mr. Norris. Mr. Norris who did
15 not get a 60-year sentence.

16 The State's request, if justice is to be impartially
17 doled out and not a personality contest, is unreasonable.

18 THE COURT: First, in this case court costs are
19 assessed, Victims' Compensation Fund Award of \$100,
20 repayment to the State of Alabama for attorneys fees that
21 have been expended by the State on behalf of the defendant,
22 any medical expenses incurred by Chambers County during any
23 point of the detention of this defendant will likewise be
24 entered.

25 This case was fully tried to a jury. There is a

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1 conviction of attempted burglary first degree. And, on the
2 record and on the transcript of this case, it will appear as
3 an attempted burglary first degree. Some of the things that
4 have been so eloquently stated by the victim in this case
5 were the exact impressions this Court had during the trial.
6 This was a premeditated, deliberated, planned, armed assault
7 upon, not the building that is the house of this victim, but
8 it was an assault on the people inside.

9 Now, thankfully, very thankfully, there were no
10 deaths involved. There was no serious injury involved. But
11 the very thought of two masked, armed felons outside of a
12 residence in a neighborhood right here in our community
13 during broad daylight hours is about as offensive as it gets
14 to the sensability of a civilized society. And, this
15 defendant, it is the belief of the Court, even after finding
16 out that this house, this home, was occupied by living human
17 beings, wanted to go forward with the plan to rob what
18 turned out to be these individuals. Masks, duct tape, guns
19 in broad open daylight. I think that the only thing that
20 prevented this from being a true tragedy, even more of a
21 tragedy than it is, that being the deaths of person or
22 persons, either the defendants, the occupants, or both, I
23 think, that the only thing that prevented that in this case,
24 was the distant wail of a siren.

25 In my 14 years on the bench to my knowledge, there's

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1 never been much more of a prompt response than was made in
2 this case. In literally a matter of minutes, I think the
3 testimony was three to four minutes from the time they were
4 spotted, there were police tearing through this yard and in
5 hot pursuit of these suspects.

6 I recall from the testimony that there was a rather
7 unsettling moment for this victim as he, being armed,
8 greeted the police, which was no small matter in and of
9 itself. He would not have been calling in a 9-1-1 emergency
10 call, he would not have been in the door of this residence
11 greeting these police armed with a 12-gauge shotgun, had it
12 not been for the actions of this defendant. The police, as
13 another potential tragedy, could have shot this homeowner,
14 and that would have been the fault of this defendant as
15 well.

16 In cases such as this, I understand the request of
17 the State and complainant, and I understand the very basis
18 for it. There's a certain amount of balancing that I have
19 to do as a judge of all cases that I see. Those being from
20 murder, from capital murder, to property crimes. So, there
21 is an entire, huge range of things that I must, by law,
22 consider.

23 After consideration of all of those, after
24 consideration of the submissions here today, and the report
25 of the probation officer, the record of the defendant, and

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1 the evidence and testimony presented at trial; it is the
2 judgment and sentence of this Court that this defendant be,
3 and hereby is, sentenced to the penitentiary of the State
4 of Alabama for a term of 40 years. As such there's no
5 probation that would apply. The defendant will be remanded
6 to custody at this time, Mr. Carmichael.

7 MR. LISEBY: Thank you, Your Honor.

8 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

9 *****

*** Frances L. Roark ***

IN THE CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT OF ALABAMA
RANDOLPH COUNTY

STATE OF ALABAMA, *
*
Versus * CRIMINAL NO.
* CC-2002-000318
* LaFayette, AL
* 15 January, 2004
*
CHRISTOPHER McCULLOUGH, *
Defendant. *

C E R T I F I C A T E

STATE OF ALABAMA)

AT LARGE)

I do hereby certify that the above and foregoing
transcript of testimony in the matter aforementioned was
taken down by me in computerized machine shorthand and
transcribed under my supervision, and that the foregoing
represents a true and correct transcript of the proceedings
had upon said hearing.

COPY

FRANCES L. ROARK, CSR, OFFICIAL
COURT REPORTER, NOTARY PUBLIC
STATE OF ALABAMA AT LARGE

My Commission Expires: 09/23/06.

Delivered and filed with the Circuit Clerk
the _____ day of _____, 2004.

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